IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM.

ARTHUR S. CHURCHILL, *Attorney General*, JOEL A. PIPER, *Secretary of State*, EUGENE MOORE, *Auditor Public Accounts*, JOSEPH S. BARTLEY, *State Treasurer*, HENRY C. RUSSELL, *Commissioner of Public Lands and Buildings of the State of Nebraska*, constituting the Board of Transportation of the State of Nebraska, and WILLIAM A. DILWORTH, J. M. KOUNTZE, AND J. W. JOHNSON, *Secretaries of said Board et al.*,

Appellants,

vs.

OLIVER AMES, OAKES AMES, FRANK AMES ET AL.,

Appellees.

Petition for Revivor and Substitution.

Now come Constantine J. Smyth, Attorney General; W. S. Porter, Secretary of State; John F. Cornell,

Auditor of Public Accounts; J. B. Meserve, State Treasurer, and J. V. Wolfe, Commissioner of Public Lands and Buildings, all of whom are officers of the State of Nebraska, and as such constitute the State Board of Transportation of the State of Nebraska, and James C. Dahlman, Joseph W. Edgerton and Gilbert L. Laws, secretaries of said Board, and represent to the Court that since the appeal in this case and at a general election held on the 3rd day of November, 1896, Constantine J. Smyth was duly elected Attorney General, and W. F. Porter was duly elected Secretary of State, and John F. Cornell was duly elected Auditor of Public Accounts, and J. B. Meserve was duly elected State Treasurer, and J. V. Wolfe was duly elected Commissioner of Public Lands and Buildings of the State of Nebraska, and that they were duly installed and qualified as such officers respectively for the State of Nebraska, and entered upon their duties as such officers on the seventh day of January, 1897, and as such officers are members of the State Board of Transportation of the State of Nebraska in lieu of Arthur S. Churchill, formerly Attorney General, and Joel A. Piper, formerly Secretary of State, and Eugene Moore, formerly Auditor of Public Accounts, and Joseph S. Bartley, formerly State Treasurer, and Henry C. Russell, formerly Commissioner of Public Lands and Buildings; and the said secretaries are secretaries of the State Board of Transportation in lieu of William A. Dilworth, J. M. Kountze and J. W. Johnson, and therefore, petition the Court that they may be substituted as appellants in this action in lieu of the said officers last above named whose term expired on the seventh day of January, 1897, and in lieu of said secretaries, whose term has expired, and that this action

may be revived in their name as officers composing the State Board of Transportation, and in the name of said secretaries as secretaries of said Board of Transportation, appellants herein, and that your petitioners may be permitted to prosecute said cause to a final judgment.

CONSTANTINE J. SMYTH,
Attorney General.
W. S. PORTER,
Secretary of State.
JOHN F. CORNELL,
Auditor of Public Accounts.
J. B. MESERVE,
State Treasurer, and
J. V. WOLFE,
Commissioner of Public Lands and Buildings,
All of the State of Nebraska and constituting its Board of Transportation, and

JAMES C. DAHLMAN,
JOSEPH W. EDGERTON and
GILBERT L. LAWS,
Secretaries of said Board.

By CONSTANTINE J. SMYTH, *Attorney General,*
Their Solicitor.

JOHN L. WEBSTER,
Of Counsel.

No. 311. 50.

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Appellants,

vs.

GEORGE SMITH, CHARLES P. GOODRICH AND LAWRENCE MINOT ET AL.,

Appellees.

311

Petition for Reviver and Substitution.

WESTERN CHRONICLE PRINT, 109 SOUTH 14TH ST., OMAHA.

IN THE

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OF THE

UNITED STATES.

OCTOBER TERM.

ARTHUR S. CHURCHILL, *Attorney General*,
JOEL A. PIPER, *Secretary of State*,
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WILLIAM A. DILWORTH, J. M. KOUNTZE, AND J. W. JOHNSON, *Secretaries of said Board et al.*,

Appellants

vs.

HENRY L. HIGGINSON, ROBERT H. GARDNER, WILLIAM C. WELLS ET AL.,

Appellees.

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By CONSTANTINE J. SMYTH, *Attorney General,*
Their Solicitor.

JOHN L. WEBSTER,
Of Counsel.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

NO. 685.

ARTHUR S. CHURCHILL ET AL.,
Appellants,
vs.
OLIVER AMES ET AL.,
Appellees.

NO. 686.

ARTHUR S. CHURCHILL ET AL.,
Appellants,
vs.
GEORGE SMITH ET AL.,
Appellees.

NO. 687.

ARTHUR S. CHURCHILL ET AL.,
Appellants,
vs.
HENRY L. HIGGINSON ET AL.,
Appellees.

(15,975; 15,976; 15,977.)

A. S. CHURCHILL, ATTORNEY-GENERAL, AND
JOHN L. WEBSTER, *Of Counsel.*
JAMES M. WOOLWORTH, *Solicitor for Appellees.*

STATEMENT.

The appellants now constitute the State Board of Transportation of the State of Nebraska and the three secretaries of said Board. The Board was established by an act of the Legislature, passed in 1887, entitled "An Act to regulate railroads, prevent unjust discriminations, provide for a board of transportation and define its duties." (Acts of 1887, Ch. 60, 1895, Statutes State of Nebraska, Sec. 4045 to Sec. 4067, inclusive.) This Board of Transportation consists of the Attorney-General, Secretary of State, Auditor of Public Accounts, State Treasurer, and Commissioner of Public Lands and Buildings. The three secretaries are selected by the Board. In 1893 the Legislature passed an act entitled:

"AN ACT TO REGULATE RAILROADS, TO CLASSIFY FREIGHTS, TO FIX REASONABLE MAXIMUM RATES TO BE CHARGED FOR THE TRANSPORTATION OF FREIGHTS UPON EACH OF THE RAILROADS IN THE STATE OF NEBRASKA, AND TO PROVIDE PENALTIES FOR THE VIOLATION OF THIS ACT." (Acts of Nebraska, 1893, Ch. 24.) For this act see Record, page 1685. This act took effect August 1, 1893. Thereupon Oliver Ames et al. filed their bill in the United States Circuit Court, District of Nebraska, making the members of the State Board of Transportation, its secretaries and The Union Pacific Railway Company respondents therein. For the bill of complaint see Record, pages 7 to 29, inclusive. In this bill an injunction was asked, and a temporary injunction issued against all the respondents. Answers were filed by all the respondents. For answer of the State Board and its secretaries, see Record, pages 31 to

72, inclusive. At the same time the two other actions were brought in the same court—one by George Smith et al. against the same officers constituting the Board of Transportation, its secretaries and the Chicago & Northwestern Railroad Company, praying a like injunction (for bill see Record, pages 113 to 135, inclusive; for answer of the Board of Transportation and its secretaries thereto, see Record, pages 137 to 158, inclusive), the other by Henry L. Higginson et al. against the same officers constituting the Board of Transportation, its secretaries and the Chicago, Burlington & Quincy Railroad Company, praying for a like injunction (for bill see Record, pages 233 to 264, inclusive). For answer of said Board and its secretaries, see Record, pages 268 to 302, inclusive.

After answers were filed, a large amount of evidence was taken and a final hearing had, and a decree entered in each of the three cases. They were all tried together below. The decree will be found in the first of the above cases in the Record at pages 99 and 100, the second decree at pages 219 and 220, and the third decree at pages 313 and 314. The rates fixed by the act were held to be unreasonable, and the injunctions were made perpetual. At the State election in 1894 Arthur S. Churchill was elected Attorney-General of the State of Nebraska, Joel A. Piper Secretary of State, and Henry C. Russell Commissioner of Public Lands and Buildings, for the term of two years each, from and after January 3, 1895; and duly qualified.

At the May term, 1895, of the Circuit Court of the United States, these three officers made application to said circuit court of Nebraska to be substituted as respondents in place of their predecessors, whose terms of office had

expired, which substitution was ordered. For same see Record, pages 2122 to 2125, and thereupon prayed an appeal to this honorable court, which appeal was allowed.

Each of the decrees contained the following express finding.

"AND IT IS FURTHER DECLARED, ADJUDGED AND DECREED THAT THE ACT ABOVE ENTITLED IS REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES, FORASMUCH AS BY THE PROVISIONS OF SAID ACT, THE SAID DEFENDANT RAILROAD COMPANIES MAY NOT EXACT FOR THE TRANSPORTATION OF FREIGHT FROM ONE POINT TO ANOTHER WITHIN THIS STATE, CHARGES WHICH YIELD TO SAID COMPANIES, OR EITHER OF THEM, REASONABLE COMPENSATION FOR SUCH SERVICES." See Record, pages 100, 220 and 314.

It is provided by Section One of the Act in question, (See Record, page 1685) that:

"THAT THE PROVISIONS OF THIS ACT SHALL APPLY EXCEPT AS IN THIS ACT OTHERWISE PROVIDED, TO ALL RAILROAD CORPORATIONS AND RAILROAD COMPANIES, AND TO ANY COMMON CARRIER OR CARRIERS, ENGAGED IN THIS STATE IN THE TRANSPORTATION OF FREIGHT BY RAILROAD THEREIN, AND SHALL ALSO BE HELD TO APPLY TO SHIPMENTS OF PROPERTY MADE FROM ANY POINT WITHIN THE STATE TO ANY OTHER POINT WITHIN THE STATE."

It will thus be seen that the Act only applies to freight, and to only such freight as is shipped from a point in the State to another point in the State. It has then no application at all to inter-state commerce. The same section then defines the meaning of "railroads" as used in this Act thus: "The term 'railroad' as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also *all the road in use by any corporation, receiver, trustee, or other person operating a railroad, whether owned, or operated under contract, agreement, lease or otherwise*, and the word "transportation" shall include all instrumentalities of shipment or carriage, and the term "railroad corporation" contained in this Act shall be deemed and taken to mean all corporations, companies or individuals now owning or operating, or which may hereafter own or operate any railroad, in whole or in part, in this State, and the provision of this Act except as in this Act otherwise provided, shall apply to all persons, firms any companies, and to all association of persons whether incorporated or otherwise that shall do business as common carriers of freight upon any of the lines of railway of this State."

Section Two of the Act classifies, "all freight or property to be transported by any railroad company or companies mentioned in the preceding section from any point in the State of Nebraska to any other point in said State." And makes it unlawful to make other classifications. Then follows Schedules A, B, C, etc. down to Z.

Then Section 3 of the Act fixes the rates to be charged and a schedule of "miles," 1st class, 2d class, 3rd class and

4th class. This Section declares: "*The reasonable maximum rate herein fixed and established shall be known as the Nebraska Schedule of Reasonable Maximum Rates.*"

Section 4 of the Act exempts certain roads: "All railroads or parts thereof which have been built in this State since the first day of January, 1889, or may be built before the 31st day of December, 1899, shall be exempt from the provisions of this act until the 31st day of December, 1899."

The evidence shows this act, if put into effect, would reduce the rates on an average of 29½ per cent.

I.

Before taking up the question as to the validity of the Act in question, we desire to call the attention of the Court to some of the propositions stated by Circuit Judge Brewer in his opinion, filed herein below; for we conceive that these propositions, thus stated, contributed largely to what we believe to be an erroneous conclusion.

In the opinion (see Record, at page 2166) it is stated: "Property invested in railroads is as much protected from public appropriation as any other. If taken for public use, its value must be paid for. * * * He may have made his fortune dealing in slaves, or, as a lobbyist, or in any other way obnoxious to the public; but, if he has acquired the legal title to the property, he is protected in its possession, and cannot be disturbed until the receipt of its actual cash value. The same rule controls if railroad property is sought to be appropriated. No inquiry is open as to whether the owner has received gifts from the state, or in-

dividuals, or whether he has, as owner, managed the property well or ill, or, so as to acquire a large fortune therefrom. It is enough that he owns the property; has the legal title; and so owning, he must be paid the actual value of that property. * * * These propositions, in respect to condemnation proceedings, are so well settled that no one ever questions them."

We take no exception to this proposition. But it is equally well settled that, where such property is encumbered, that the encumbrance cuts no figure in ascertaining the cash value of the property in such condemnation proceedings. The party holding such encumbrance would be entitled to the proceeds to the extent of such encumbrance; provided, it did not exceed the actual cash value so ascertained; but where it did, the property would be discharged of the lien, and the party holding such encumbrance would have to look to the personal liability of the obligor.

Again, it is said in the opinion (at page 2167): "If it be said that the rates must be such as to secure to the owners a reasonable per cent on the money invested, it will be remembered that many things have happened *to make the investment far in excess of the actual value of the property —injudicious contracts, poor engineering, unusually high cost of material, rascality on the part of those engaged in the construction or management of the property.* These, and many other things, as is well known, are factors which have largely entered into the investment with which many railroad properties stand charged. Now, if the public was seeking to take title to the railroad by condemnation, the present value of the property, and not the cost, is that

which it would have to pay." Then, indeed, would the loss arising from "injudicious contracts, poor engineering, unusually high cost of material" and the "rascality on the part of those engaged in the construction or management of the property" fall upon those who made the "injudicious contracts" or employed "poor engineering" to be done, or paid "unusually high cost for material," or engaged the rascals in the construction or management of the property. And why should they not? Did not the investors, in either the stock of the company, or in its bonds, take his chances in these respects, just the same as the investor in the stock of any other business corporation, or in the bonds or mortgages upon any other property? Why, may we not ask, should the public bear the burden imposed by "injudicious contracts," or "poor engineering," or the "unusually high price paid for material," or the "rascality on the part of those engaged in the construction or management of the property?" The public had nothing to do with any of these. The public did not invest upon such chances. The public can justly be called up to pay such reasonable rates as will yield a reasonable compensation for the use of the fair and reasonable value of the property, and not more. If investors put their money into the hands of those who thus manage the property, or in securities upon properties thus constructed, or managed, it was either their misfortune or their folly; but it affords no excuse for burdening the public with high rates, to the profit either of the rascals or to those who trusted in them.

His Honor further added in the opinion: "*Nevertheless, the amount of money that has gone into the railroad property as the actual investment, as expressed, theoretically at*

least, by the amount of stock and bonds, is not to be ignored, even though such sum is far in excess of the present value."

Is it possible that the patrons of a railroad, who had nothing to do with the injudicious contract, poor engineering, unusually high cost of material, rascality on the part of those engaged in the construction or management must bear all of the burden of these injudicious contracts, poor engineering and rascality in the construction or management in order that the poor engineers and rascals or those who employed them may reap the benefit? If this be so, then, indeed, the time has actually come when the railroad lord can say to the public: "Ye know I reap where I had sown not, and that I gathered where I had not strewn."

Again, his honor tells us that: "*The transportation of persons and property by private individuals and corporations has become a business and not a system.*" See page 2163.

Then, page 2164 says: "Now in the carrying on of any private enterprise, increase of business, with increase of profits is a stimulating thought, and for this *every variety of action is taken. Advancement, solicitation, inducement, favors are all freely resorted to, but with the single purpose of larger business and greater gain.* It is not strange that in carrying on of transportation all the *characteristics of other kinds of business are found.*"

There can be no doubt about the correctness of either of these propositions. We admit their truth, and insist that there shall be applied to this business and to these inducements the same rules of law which are applied under similar circumstances to other business and to like inducements in the management of other business enterprises.

Suppose a corporation should undertake the erection of a ten-story store-warehouse, in the City of Chicago, and it employed a poor architect or made an injudicious contract for its construction, or paid unusually high prices for material, or there was rascality on the part of those engaged in its construction or management, and by reason thereof the corporation had mortgaged its property for twice its actual value (the corporation having good credit at the time), and during its construction this corporation had leased it for fifty years at a reasonable rental. Afterwards the property depreciated, material became cheaper and still the property was incumbered by the original incumbrance with a high rate of interest, and a court of equity was called upon to fix this *reasonable* rent, would it consider the injudicious contract, or the poor architectual design, or the rascality on the part of those engaged in the construction or management of such a corporation? It seems to me not. Then if railroading is a business in which men are engaged and money is invested from the same motive as in other business, why should not it be governed by the same principles? If it be said it is a permanent business, so is the erection of a stone warehouse a permanent business. If it be said, that the operating of a railroad is a public use, so is the operating of a warehouse a public use.

Without any statute regulating rates, a common carrier of persons or property, in the absence of a specific contract, is, at common law, bound to carry either persons or property for a reasonable compensation.

So, in the absence of a specific contract, a tenant is

bound to pay a reasonable rental for the use of the leased premises.

Thus, a large number of instances might be cited where the law would imply a reasonable compensation for the use of property or persons, or both; yet, we know of no instance where, in arriving at what is a just or reasonable compensation, either the encumbrance upon the property, or the unusually high price paid for material, or the lack of skill in the mechanic who constructed the property, or the rascality of those in charge of the construction or management was taken into consideration, by any court in determining what was a reasonable compensation. These propositions are elementary. It needs no citation of authorities to support them.

Then, if railroading *is a business*, and no one would dispute it, we can see no reason why it should not be governed by the same rules of law as other business is in determining what is and what is not a reasonable compensation.

Such, however, was not the rule applied below, as we have seen, for the court stated: "The amount of money that has gone into the railroad property, as expressed, theoretically at least, by the amount of stock and bonds is not to be ignored even though such sum is far in excess of the present value." If not to be ignored it must have been considered in determining the reasonableness of the rates. In *Williams vs. Chicago and Grand Trunk Ry. Co.*, 83 Mich., 592. In the opinion it is said: "Why should a corporation, which is more economical than another in the matter of expenses, be at a disadvantage in the law over one that

is extravagant? And why should a corporation out of debt be adjudged entitled to charge less for its services than one heavily in debt? As was well said on the argument, it would be a strange ordinance of a city that would regulate the amount of fare to be charged by a hackman by the cost of his team and carriage, and take into consideration the debts he owed and the interest that he was paying. And yet, if railroads are to be regulated or controlled in the matter of fares by the legislature, upon what principle must they be classified, in accordance with their net earnings, and their indebtedness taken into consideration, which does not govern also the imposition of rates upon hackmen? One is a common carrier as well as the other. Both may be said to have privileges granted them by the Government which authorize a reasonable regulation of their charges, but the privileges of a hackman sink into insignificance when compared with the franchise and privileges granted to railroad corporations, and yet no one has ever contended that a hackman could interpose the cost of his team and carriage, or his indebtedness upon them, against the reasonableness of the restriction of his charges."

1. *Every presumption is in favor of the validity of the Act in question.*

2. THE ACT WILL NOT BE PRESUMED TO BE REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES, OR OF THE STATE.

3. IT MUST BE MADE TO APPEAR AFFIRMATIVELY THAT THE ACT IN QUESTION IS REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES.

In *Ragan vs. Farmers Loan and Trust Company*, 154 U. S., 362-395, it is said: "It is not to be supposed that the legislature of any state, or a commission appointed under the authority of any state, will ever engage in a deliberate attempt to cripple or destroy institutions of such great value to the community as the railroads, but will always act with the sincere purpose of doing justice to the owners of railroad property, as well as to other individuals."

THIS BEING SO, THEN IT MUST BE MADE CLEARLY TO APPEAR FROM THE PLEADINGS AND THE EVIDENCE THAT THE LEGISLATURE, IN PASSING THE ACT IN QUESTION, DID NOT, IN FACT, DO JUSTICE TO THE SEVERAL RAILROADS AFFECTED BY THE ACT; AND THAT BY REASON THEREOF THE PLAINTIFFS BELOW WERE INJURED IN THEIR PROPERTY RIGHTS AS STOCKHOLDERS IN SUCH COMPANY OR COMPANIES.

Then it must follow that, before the decree below can be sustained, that the following propositions of fact must have been established by competent evidence.

1. *That the plaintiffs below were stockholders in the respective corporations, as alleged.*

2. *That each of the railroads are operated in a prudent and economical manner.*

3. *That, when so managed, the reduction of rates provided for in the act, when taken in connection with all the other earnings of the several companies, will deprive such company of a just or reasonable compensation for the services so performed.*

4. *The plaintiffs below attacked the constitutionality of the act; the burden, therefore, was upon them to establish every essential element of fact necessary to show the invalidity of the act*

The answer of appellants puts in issue every one of the above questions of fact, save the one as to the plaintiffs below being stockholders, which is admitted.

We call the Court's attention, then, to the fact that there is wanting any competent evidence tending to show that either of these railroads are prudently or economically managed.

Neither is there any evidence tending to show the income from all the business of the several companies from all sources.

Mr. Randall, who is the auditor of the Burlington company, in his evidence (page 630) says: "The operating expenses in 1892 were $1,221,742.84."

These are his corrected figures. The first will be found at page 542. How this enormous sum of money, which is charged up to operating expenses was expended, does not appear. How much of it was used in paying exorbitant salaries to high officials, or in excessive attorneys' fees, or in damages resulting from negligence, or to the lobbyists to prevent supposed hostile legislation or in rebates to favored parties, the Record is silent concerning.

The Record does show, however, that all expenditures of this character were charged to operating expenses.

Mr. Taylor says (page 612): "My judgment is, the expenses incurred are economically conducted." This is

entirely incompetent. It is simply the opinion of the witness—while the facts should have been shown, so the court might determine the reasonableness of these expenditures. But this is all the evidence upon that question. As to the necessity of the entire earnings of these roads appearing in evidence before the act can be declared invalid, see *Commonwealth vs. Covington and Cincinnati Bridge Co.*, 21 S. W. Rep., 1042, Vol. 7, American Railway and Cor. cases, page 638, decided by the Court of Appeals of Kentucky, March 25, 1893. In the opinion it is said: "It is further argued that the reduction of tolls on the foot and wagon ways over appellee's bridge amounts to a confiscation of the property, and, as in the Ferry case, the tolls, as reduced by act of March, 1890, will not pay the expense of keeping up the two ways. By the charter the appellees were required to make these ways a part of the main structure, and, while the income from the foot and wagon ways may not, when applied to improving them alone, or keeping them in repair, be sufficient for that purpose, yet the entire structure may be yielding a handsome income. * * * The foot and wagon ways are a part of the transfer company's bridge, and the profits on the entire structure must be considered. What those profits are does not appear; and we must assume, in the absence of testimony to the contrary, that the receipts from the structure are in excess of the expenditures; and before this court can undertake to say that the appellee has been deprived of compensation for the use of its property we must be informed as to the revenue received from the entire structure, and in the absence of such a showing, will not say that the legislature, in regulating these tolls, has violated both the Federal and State

Constitutions." This case was reversed by this court (154 U. S., 204), but not upon this ground.

So, in relation to these railroads, they form a part of an entire system. These subordinate lines are simply branch feeders to the main line, a portion of the system. These branches, as well as the main lines, receive freight and passengers from points without the State of Nebraska, and discharge such freight and passengers at points within the State, and, conversely, as well as handling through passengers and freight—all of which should contribute to the expense of keeping up as well as of the handling and operating of the roads, and all pay tribute to the gross receipts; and, aside from this, all carry mail and expressage. And we contend that, without evidence showing all these, this court cannot hold the act in question to be repugnant to either the Federal or State Constitution.

As to the operating expenses see *Chicago etc. Ry. Co. vs. Weilman*, 143 U. S., 339 on 345. "It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries; fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for if so advised, it might clearly appear that a prudent and honest manage-

ment would, within the rates prescribed, secure to the bondholders their interest and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call "operating expenses."

That the entire business of the consolidated company as a whole must be considered in determining reasonable rates. See *St. Louis & San Francisco Ry. Co. vs. Gill*, 156 U. S., 649 at 665 and 666.

After Paying Expenses of Operation, Who Is to Determine What Are Reasonable Rates?

Lord Ellenborough, in *Aldnut vs. Inglis*, 12 East., 527, on 537, said: "There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms." This is cited with approval in *Munn vs. Illinois*, 94 U. S., on 127; and it is said in the latter case, on 132: "Certainly, if any business clothed 'with a public interest ceases to be JURIS PRIVATI only,' this has been."

If a warehouse can "cease to be juris privati," certainly the "business" of railroading must. It has been so often held, in substance, that a railroad company, in accepting of its charter and entering upon the construction and operation of its road under such charter, undertakes the performance of a public duty, a function of government, in consideration of which it is clothed with the power of eminent domain, and thereby devotes its property to a quasi-public use; that no citation of authority is needed to support the same.

If it be true that railroad property ceases to be JURIS PRIVATI, and is clothed with a quasi-public use, whenever the operation of such railroad is undertaken, then it must follow as a corollary thereto that all parties dealing with such property, or taking security upon such property, must take such property or security thereon with notice of such quasi-public use. In *Reagan vs. Mercantile Trust Co.*, 154 U. S., 413, on 416 in the opinion it is said: "By the act of incorporation, Congress authorized the company to build its road through the State of Texas. IT KNEW THAT, WHEN CONSTRUCTED, A PART OF ITS BUSINESS WOULD BE THE CARRYING OF PERSONS AND PROPERTY FROM POINTS WITHIN THE STATE TO OTHER POINTS ALSO WITHIN THE STATE; AND THAT IN SO DOING IT WOULD BE ENGAGED IN A BUSINESS, CONTROL OF WHICH IS NOWHERE BY THE FEDERAL CONSTITUTION GIVEN TO CONGRESS. IT MUST HAVE KNOWN THAT, IN THE NATURE OF THINGS, THE CONTROL OF THAT BUSINESS WOULD BE EXERCISED BY THE STATE."

If Congress must have known that, when this road was constructed, a part of its business would be the carrying of persons and property from points within the State to other points in the State, and that as to such business control would be exercised by the State, so also must the corporation itself have known, and also the purchasers of all the bonds of the Union Pacific Company. Now, if Congress knew, and in providing aid to this company in the issue of the Government bonds, did not see fit to exempt this road from State control as a further security for the payment of these bonds, then it must follow that, as to these bonds, they cannot be taken into consideration in the fixing of these reasonable rates.

Had Congress deemed it necessary, to the further security of the Government bonds, that this road would be exempt from State control, it would have said so. It is further said in the Reagan case, i. e., had Congress "*deemed that the interests of the nation and the discharge of the duties required on behalf of the nation from this corporation demanded exemption in all things from state control, it would unquestionably have expressed such intention in language whose meaning would be clear.* Not having done so, it is manifest Congress expected such business to be regulated by state legislation." The right, then, of the Government under its bonds is subject to and inferior to the right of the State in its control of freight rates as to purely Nebraska freights. It must also be equally true of the holders of the first bonds of the Union Pacific Company. For this right exists by virtue of the law permitting regulation and control of purely domestic business by the State, and the law enters into and forms a part of the contract. It is a right inherent in the

State by virtue of the public use to which the corporation dedicates its property in accepting of its charter and entering upon the performance of its duties thereunder.

If this presumption of knowledge is true of Congress and as to the holders of the bonds of the Union Pacific company, it must be equally true of the holders of bonds of each of the other companies to these actions. It follows then:

1. THE RIGHT OF THE STATE TO FIX A REASONABLE MAXIMUM FREIGHT RATE UPON ALL FREIGHT SHIPPED FROM ONE POINT IN THE STATE TO ANOTHER POINT IN THE STATE IS PARAMOUNT TO ANY RIGHT WHICH IS OR MAY BE ACQUIRED BY ANY BONDHOLDER, WHETHER THAT BONDHOLDER BE THE GOVERNMENT OR A PRIVATE INDIVIDUAL.

2. THE RIGHT OF THE STATE BEING A SUPERIOR RIGHT, IN DETERMINING WHAT IS A REASONABLE RATE, THE INTEREST OF SUCH BONDHOLDER CANNOT BE SET UP OR CONSIDERED AS AGAINST THE INTEREST OF THE STATE.

3. IN DETERMINING THE REASONABLENESS OF THE RATES IT CANNOT BE OTHER THAN SUCH A RATE AS WILL PAY THE EXPENSE OF OPERATION, WHEN PRUDENTLY AND ECONOMICALLY MANAGED, AND SOMETHING MORE, AT LEAST, FOR THE USE OF THE COMPANY.

II.

THE NEXT QUESTION WHICH NATURALLY ARISES IS, WHO IS TO DETERMINE WHAT SUCH EXCESS ABOVE OPERATING EXPENSES SHALL BE? IS IT A QUESTION FOR THE COURTS, OR IS IT A QUESTION OF PUBLIC POLICY, AND THEREFORE A QUESTION FOR THE LEGISLATURE?

It is stated in the opinion of the Railroad Commission case (116 U. S., 307) that: "The power to regulate is not a power to destroy, and the limitation is not the equivalent to confiscation. Under the pretext of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use, without just compensation or without due process of law." This quotation is copied by Justice Brewer in the Ragan case (154 U. S., on page 398) with approval.

St. Louis & San Francisco R. R. Co. vs. Gill, 156 U.S., on 663 and 664, the Court say: "After recognizing the previous cases as establishing the proposition that, while it is not the province of courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of the judicial duty to restrain anything which, in the form of a regulation of freights, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property."

The exception to legislative control must then be by reason of the legislation itself operating to destroy the property, or the limitation fixed by the statute must be equivalent to confiscation, or require the railroad corporation to carry persons or property without just regard, or the act itself must operate to do that which in law amounts to a taking of private property for public use, without just compensation or without due process of law. The legislation in question does not amount to the taking of the actual property of the railroad company. It does not seek to take the property; neither does it purport to seek to require the railway company to carry either persons or property without reward. For the very act itself provides a charge or rate to be paid upon each and all of the various classes of property, in all of the various classes of freight, which the act in question establishes and seeks to regulate. Hence, it cannot be said that the act in question seeks to take private property for public use without just compensation; nor can it be said that the act in question requires these railroad corporations to carry the property without reward. Can it be said that this act in question will operate to deprive these corporations of equal protection of the law? The law in question it is true does not operate upon all railroads in Nebraska the same, but it classifies the roads, and does apply alike to all roads of the respective class. In *Dow vs. Beidelman*, 125 U. S., 680 on 691, the Court say: "The legislature, in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of business which they have done, or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried, or of the gross, or of net earnings during a previous year, or according to the similar and more constant test, of the

length of the line of the railroad, is a matter within the discretion of the legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws."

The same was in substance held in the *Burlington R. R. vs. Iowa*, 94 U. S., 155. In Railroad Commission cases 116 U. S., page 335, the court say: "General statutes regulating the use of railroads in a state, or fixing maximum rates of charges for transportation, when not forbidden by charter contracts, do not necessarily deprive the corporation owning or operating a railroad within the state of its property without due process of law, within the meaning of the 14th amendment of the Constitution of the United States, nor take away from the corporation the equal protection of the law."

If these decisions are based upon sound principles of law, it must follow that so long as the act is constitutional in all other respects and does provide a rate sufficient to more than pay operating expenses, it is a question of legislative policy and one which the courts cannot inquire into. It cannot be successfully contended that so long as the rate fixed pays something above operating expenses to the corporation for the carrying of property, it amounts to taking either of the use or, of the property. It may be said that just compensation is equivalent to reasonable compensation. Then the question is, who is to determine the question of reasonableness? Is it the courts, or is it the legislature? It seems to us, that if the legislation does not actually deprive the corporation of its property nor, require

it to carry persons or property without reward, sufficient to more than pay operating expenses economically administrated, it is purely a question of *public policy* into which the courts cannot inquire. It seems to us, that this right of the legislature to say what is reasonable, subject to the limitations above mentioned, is as much a question of public policy as is fixing the rate of interest for the use of money. I apprehend that no court would undertake to hold that an act of the legislature of Nebraska fixing one per cent. as the lawful rate of interest upon money loaned within the State, and declaring all higher rates to be usurious, to be unconstitutional. It might operate to drive money out of the State, it might be criticised as poor public policy, and might possibly be said to be detrimental to the best interests of the State; yet no court for these reasons, would undertake to hold that such an act was in conflict with any provision of the Federal, or State Constitution.

Could it be said that a maximum freight law, which fixed the rates so as to only pay one per cent. upon the present value of the roads after paying the reasonable operating expenses, was as a matter of law unconstitutional?

Such a law might retard the building of railroads, it might deter capitalists from investing in railroad stocks and bonds, it might be criticised as an unwise measure, it might be said to be poor public policy and it might be said to be detrimental to the whole interests of the State; yet these afford no sufficient reasons for the court to hold such a law to be in conflict with any provision of the Federal or State Constitution.

These are questions purely of public policy and with which courts have nothing in the world to do. No question is more firmly settled in the jurisprudence of this country than is the one that, what is and what is not public policy, is one for the legislature and not for the courts. And as is said by Justice Shiras in *Brass vs. Stoeser*, 153 U. S., on pages 404 and 405: "This may be burdensome, but it affects all alike engaged in the business, and if it be regarded AS CONTRARY TO SOUND PUBLIC POLICY THOSE AFFECTED BY IT MUST INSTRUCT THEIR REPRESENTATIVES, IN GENERAL ASSEMBLY MET, TO PROVIDE A REMEDY."

So we say, if the rate, fixed by law, is such as to provide for a rate which will pay more than operating expenses where the roads are managed and operated with economy, it is not for the courts to say what that income shall be, when it applies to all alike who are alike situated in that business. "If it be regarded as contrary to sound public policy, those affected must instruct their representatives in general assembly met, to provide a remedy;" but it is no province of the court to interfere.

A careful review of all the cases, both state and federal, we think, will show the true rule to be that, so long as the legislation itself does not operate to deprive the individual or corporation of his or its property, nor ~~does not~~ require the actual use of the property of the individual or corporation without compensation, then such legislation cannot be said to be in conflict with either the State or Federal Constitution. What such compensation shall be, after paying operating expenses, is purely a question of public

policy to be determined by the legislature and not by the courts. If this be true, certainly there was error in the circuit court, decreeing a perpetual injunction against the law in question. The evidence establishes beyond question that the rates fixed under this law will produce an income considerably more than sufficient to pay operating expenses.

We quote the following from a review of the decisions upon state regulations, by Mr. Dunbar, published in the April, 1895, number of The Quarterly Journal of Economies, at page 317:

"If the power to regulate prices and charges, general as to the subjects upon which it may be exercised, is limited as to degree, such limitation must result from some constitutional prohibition. The Constitution of the United States is of a limited scope. It does not profess and was not designed to prevent all possible unwise and unjust legislation. Except within the purview of its provisions it does not affect the sovereign power of the several States, or afford protection against oppressive acts, even when such acts are opposed to the conceptions of natural justice. It devolves upon those who seek to impugn the validity of a state law as unconstitutional, to point out in what respects it violates the supreme law of the land. As was said by Mr. Justice Field, delivering the opinion of the court in a case involving the validity of a law imposing special burdens on railroad companies in regard to maintaining fences: "It is hardly necessary to say, that the hardship, impolicy, or injustice of State laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from State legislatures.

Our jurisdiction cannot be invoked unless some right claimed under the Constitution, laws or treaties of the United States is invaded. This court is not a harbor where refuge can be found from every act of ill-advised and oppressive state legislation" *Missouri Pacific Railway Co. vs. Humes*, 115 U. S., 512, 520.

The Constitution itself contains no provision restricting the power of the states as to such legislation. It has, indeed, been contended that, where such legislation was applied to a corporation, it constituted a violation of a contract with the State embodied in the charter, and was thus brought within the provisions of Article 1, Section 10. But this argument has been rejected by the Supreme Court, even when the charter contained no express power of amendment and repeal. See *Ruggles vs. Ill.*, 108 U. S., 526. It was early decided that the first eight amendments did not limit the power of the states; *Barron vs. Mayor of Baltimore*, 7 Peters, 243, and it may now be assumed that the power of the states in this respect is unlimited, so far as the Federal Constitution is concerned, unless restricted by the provision of the Fourteenth Amendment, that no State shall "deprive any person of life, liberty or proporty without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws" The question is, in fact, therefore purely of the construction and scope of that amendment.

It cannot be successfully contended that regulations of trade, even if carried to the point of prohibiting an industry, infringes the constitutional guarantee of liberty. Some state courts have indeed held that liberty includes the right to engage in any lawful pursuit without interference;

but this doctrine has never been laid down by the Supreme Court of the United States, and it is clear, as shown by a recent writer in the Harvard Law Review, that historically and as a matter of sound construction, liberty in this connection signifies freedom from personal restraint It is equally true that such regulations do not constitute a denial of the equal protection of the laws. The scope of the latter provision was considered by the Supreme Court in *Barbier vs. Connolly*, 113 U. S., 27, and was said to mean that equal protection should be extended to all under like circumstances; that no restraints or burdens should be put upon any one, except such as were imposed on others in the same calling and condition. If, therefore, the power of the state is restricted, it is because such regulations may, under certain conditions, amount to a taking of property without due process of law.

Before considering whether such regulations can, under any circumstances, constitute a taking of property without due process of law, it is important to discriminate clearly between laws regulating certain uses of property and laws requiring property to be used for the benefit of others. If the legislature of a State should require all capitalists to lend money to any person furnishing security for the repayment of the principal, but forbidding the exaction of interest, it would be an example of a law of the latter class. But such legislation would differ widely from a usury law, even if the latter extended to prohibiting the taking of interest altogether; and, if the case first supposed should be deemed to constitute a deprivation of property, it would not follow that there was such a deprivation under a law fixing the rate of interest, however low that rate might be.

To render a State law invalid, as inconsistent with the provision of the Fourteenth Amendment now in question, it must be shown that some right of property is infringed.

Again, on page 321: "Judged by the effect upon property, it is, of course, immaterial whether injury is inflicted in promoting health and morals, or in advancing the public welfare otherwise. In either case the value of the property affected is alike impaired. The power of the State to protect and promote the public health and morals is a part of its general power to promote the public welfare. The 'police power' is but a convenient name for describing the general right inherent in every sovereignty to regulate its domestic affairs." Mr. Justice Barbour, delivering the opinion of the Court in the case of *New York vs. Miln*, 11 Peters, 102, declared the law to be, "that a State has the same undeniable unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States; that by virtue of this, it is not only the right, but the bounded and solemn duty, of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner just stated; that all those powers which relate merely to municipal legislation, or what may, perhaps, more properly be called internal policy, are not thus surrendered or restrained; and that consequently, in relation to these, the authority of a State is complete, unqualified and exclusive." In like manner,

in the later case of *Barbier vs. Connolly*, 113 U. S., 27, Mr. Justice Field, delivering the opinion of the Court, declared that "neither the (Fourteenth) amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State (sometimes called its police power) to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."

It is not easy to perceive, in view of these principles, on what ground that class of laws designed to promote health and morals is to be distinguished, in the matter now under consideration, from other laws designed to promote the public welfare in other directions. The only sanction for the former, when they injuriously affect private interests, would seem to be the supremacy of the public interest; and that sanction equally justifies the latter class. If, then, public welfare is established as a test of constitutionality—and no other test seems logically possible—the determination of the constitutional question depends upon the question of public policy. This results in throwing upon the courts the burden of reviewing the decision of the legislature upon a question primarily political, of determining whether the public welfare calls for a particular measure in order to decide whether that measure is constitutional. If the right of a State to carry its regulations so far as to prohibit a trade or industry, except when designed to protect the public health and morals, is denied, another and perhaps even more difficult question arises. The arguments already adduced show that there is no right of property

which implies freedom from all legislative regulation upon prices and charges. If a State may impose regulations of this sort upon all kinds of industry, but is prevented from carrying such regulations to the extent of prohibition, it becomes necessary to determine at what intervening point the regulation infringes upon a right of property. Those who deny the full authority of the State, fix the limit at the point when regulation ceases to be "reasonable," and, in substance, assert the existence of a right to deal with property, when not lawfully prohibited, subject only to "reasonable regulations of price, and maintain that any infringement of this right is a deprivation of property without due process of law, thus raising for judicial determination the question of what are reasonable regulations."

The case of *St. Louis and San Francisco R. R. Co. vs. Gill*, 156 U. S., 649, is not referred to in the above article. In this latter case, Justice Shiras, speaking for the whole court, in reviewing the prior decision on page 657 thus sums up what had been determined: "This court has declared, in several cases, that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws." We take it, then, that this is as far as the courts have gone.

The legislation, then, must be shown by the evidence

to be such as to deprive the companies of their property without due process of law, or as to deprive them of the equal protection of the laws. But it is said in this same case, at page 663: "The opinion of this court on appeal was that, while it was within the power of a court of equity in such case to decree that the rates so established by the commission were unreasonable and unjust, and to restrain their enforcement, it was not within its power to establish rates itself, or to restrain the commission from again establishing rates." If it is not, then, within the power of the court to establish rates itself, it must exist within the legislative power, restricted only so far as not to fix such rates so low as to deny the companies the right of property or the equal protection of the law. It must follow, then, that so long as the rate fixed by the law will pay the operating expenses when economically administered, and something in addition thereto, the power of the court ends, and the extent to which rates must produce profits is one of political policy.

The Burlington Company.

The evidence shows House Roll 33 would reduce the rates on freight shipped from points in Nebraska to other points in the state .295 per cent.

Mr. Randall, who was the auditor of the Burlington Company, says (see page 542), in answer to the question: "State what were the earnings of the company in 1892 upon freight shipped between points, both of which, that is, the points of origin and destination, were within the state?" Answer—"$1,853,036.59." This sum, then, is what the law in question would operate upon. Had House

Roll 33 been in force during the year 1892, then this sum of $1,853,036.59 is 1.295 per cent of what it would have been.

This sum then, divided by 1.296, would give the earnings upon freight shipped from points in Nebraska to other points in the state, which is	$1,430,916.99
This same witness says on page 542, the operating expenses were	972,183.70
But he was recalled, and on page 630 he says the other figures are all correct except operating expenses, which should be	1,251,742.84
This sum, deducted from the sum of	1,430,916.96
Would give	209,174.12

The net earning on freight shipped from one point in the state to other points in the state had House Roll 33 been in force in 1892 on the Burlington road.

Now it cost	$1,221,742.84
To earn	1,853,036.59

Then to earn one dollar it would cost .6595 or 66 cents. Then the net earning was 34 cents. This same witness on page 573 says :

"The total earned for the year was	$8,711,972 69
Now purely Nebraska earnings	1,853 036.59
The difference then is	6,858,936.10

This amount would not be affected by House Roll 33.

34 per cent then of this	$6,858,936.10
Would be net earnings	2,332,038.83
To this amount add Nebraska net earnings	209,174.12
That would make	2,541,212.95

As the net freight earnings by the Burlington Company had the law in question then been in force, and not the sum of..... 77,617.00

As found by the table in the opinion filed below. See page 2173.

The witness Taylor, who is treasurer of this company, gives the same figures. See Record, pages 590 and 591.

Union Pacific Company.

Mr. Van Kuran, on page 617, says: "I have been freight auditor for seven years past and have been connected with the auditing department for twenty years. I have made an examination of the affairs of the company involved in the controversy in the case of *Ames et al. v. Union Pacific Company et al.*"

Q. "What were the freight earnings of the Union Pacific Company upon the Omaha and Ogden lines within the State of Nebraska for the year ending June 30, 1893?" (page 618).

A. "$4,313,204.46."

Q. "What were the freight operating expenses, exclusive of taxes?"

A. "$2,344,975.00."

Q. "What were they inclusive of taxes?"

A. "$2,501,935.00."

The witness is then asked (page 618): "What per cent of the whole business was business beginning and ending in Nebraska?"

A. "About 15 per cent" (page 618).

As the law in question could only operate upon freights beginning and ending in Nebraska, it could then only operate upon the 15 per cent of.....	$4,313,204.00
The other 85 per cent would not be affected by the law at all. The 15 per cent would be 15-100 of.....	4,313,204.00
Which would be	287,546.93
This amount would be reduced .295 per cent, which would be.....	65,502.97
This amount deducted from the total amount of the gross earning of.....	4,313,204.00
Would give the gross earning, had the law in question been in force from June 30, 1892, to June 30, 1893, which would be..	4,247,701.03
Deduct the gross operating expenses, including taxes.....	2,501,936.00
Which would give the net earnings.....	1,745,765.03
Instead of.....	55,596.00

As given in the opinion below. See Record, page 2173, Court's tables.

1. THIS, THEN, EXCLUSIVE OF THROUGH FREIGHTS, OF ALL PASSENGER TRAFFIC, OF ALL RECEIPTS FROM CARRYING MAIL AND FROM EXPRESS, WOULD GIVE A NET PROFIT TO THE BURLINGTON COMPANY OF $2,541,212.95, had the law in question been in force during the year 1892, or 5 per cent on its 2,253 miles of road, at a valuation per mile of $22,485.62.

2. AND THE UNION PACIFIC COMPANY, EXCLUSIVE OF THE SAME, WOULD HAVE A NET AMOUNT OF $1,745 765.03, HAD HOUSE ROLL 33 BEEN IN FORCE IN 1892, or 5 per cent. on its 1,186 miles at a valuation per mile of $29,239.20.

Both the Union Pacific Company and the Burlington Company are trunk lines extending west of Nebraska, and the Burlington extending east to Chibago, while the Union Pacific Company makes connection at Council Bluffs with other roads extending to Chicago. The earnings which we have just shown, from the evidence of Mr. Randall and Mr. Van Kuran, are entirely upon two classes of freights, the one class having its place of shipment and destination both within the State of Nebraska, the other class covering freights within the State of Nebraska, having their points of shipment within the State and their points of destination without the State, and freights whose points of shipment are without the State and the point of destination within the State, but does not include freights shipped by either road where both the point of shipment and the point of destination are without the State. Nor does it include anything from the carrying of the mails or express, or from passenger traffic.

There can be no question, however, but what that portion of these two roads within the State of Nebraska are entitled to some credit on the net earnings of through freight which has neither its point of shipment nor point of destination within the State of Nebraska, as well as from this other business.

The companies took the evidence of Mr. Albert Fink, who says that he has had twenty-eight years of experience in transportation of railroads. On page 661 Mr. Fink says: "The result is that the cost of carrying local freight is four times as much as the cost of through freight per ton per mile." It necessarily must follow, then, that there

should be added to the above figures a handsome sum as the net profit, to these two roads, on through business.

North-Western Railroad:

For some reason or other, neither the auditor of the Chicago and North-Western Railroad Company, nor any of the auditors of the subordinate lines of the North-Western system, were put upon the stand. There is no evidence to show its earnings or operating expenses; consequently we are unable to show just what their net earnings would have been. The evidence does, however, disclose that this system is a trunk line extending from Chicago west across the State of Nebraska, into the territory lying to the west and northwest. It is fair to assume that, had the facts been as favorable to that company as the facts were to the other two companies, the auditor or auditors of this company, or of these subordinate lines, would have been produced and their evidence taken. The presumption of law is, that these witnesses were not produced because their evidence would have disclosed facts unfavorable to that system.

These companies have assailed the reasonableness of the rates fixed by this law. The burden, then, is upon them to show the unreasonableness of such rates, and not upon the appellants to show the reasonableness of such rates. When we have shown, then, from the evidence of the complainants below, taken from the books of the company, that the rates so fixed by the law, will afford a reasonable compensation, the law will be presumed valid. The law will also presume, from the fact that no such evidence was furnished by the North-Western system, that it

was because of its knowledge that such evidence, had it been produced, would have disproved the allegations of the bill.

The validity of the act in question, then, affirmatively appears, as shown by this evidence, taken from the books of these two companies.

Mr. Dilworth, in his evidence (page 932), gives a table, marked "DEFENDANT'S EXHIBIT 4," which his evidence shows is made up from the official reports of the several railroads therein mentioned, made under the laws of this State, under oath, and filed with the Board of Transportation.

This table shows the amount received by the Burlington Company on passenger business in Nebraska, on freight hauled in Nebraska, including inter-state and local freights; the amount received by the Chicago, St. Paul, Minneapolis & Omaha on passenger business, on freight, inter-state and local; the amount received by the Fremont, Elkhorn & Missouri Valley Railway Company on passenger and freight business, local and inter-state; the amount received by the Union Pacific Railway Company, the Omaha & Republican Valley Railway Company, the St. Joseph & Grand Island Railway Company, and the Kansas City & Omaha Railway Company, on passenger and freight business, local and inter-state. These are the three roads and their subordinate branches involved in these suits. This does not, however, include either freight or passenger business where neither the point of origin nor point of destination is in the State of Nebraska.

Mr. Dilworth (on page 980) gives another table, made from these same reports, marked "Exhibit 20." This table gives the number of tons carried by each of the roads and their branches, the number of tons of inter-state freight, the number of passengers carried locally and inter-state, and gives the per cent. of the expenses to the earnings.

From these two tables we have made a computation, showing the net earnings of these companies and their branches for the year 1893, carrying it out into the total amount received by each one as follows:

1893.

	Total Amount rec'd on all business done in the State.	Amn't rec'd after paying expenses.	Per cent. of profit
B. & M.	$8,554,920	$2,920,591	34 49-100
C., St. P , M. & O.	917,644	325,029	35 42-100
F., E. & M. V.	3,053,283	1,414,891	46 34-100
U. P.	5,865,081	2,433,422	41 49-100
O. & R. V.	1,220,113	71,498	05 86-100
St. J. & G. I.	362,912	137,725	37 95-100
K. C. & O.	177,491	41,710	23 50-100

According to the above table, the net earnings in 1893 of each of these roads was, per mile, as follows:

	No. miles.	Net earned.	Net per mile.
B, & M.	2,253	$2,950,591.00	$1,172.02
C., St. P., M. & O.	261	325,029.00	1,245.31
F. E. & M. V.	985	1,414,891.00	1,436.43
U. P.	467	2,433,422.00	5,210.75
O. & R. V.	414	71,498.00	172.46
St. J. & G. I.	112	137,725.00	1,229.68
K. C. & O.	193	41,710 00	216.12

To show that our table is not very far out of the way we here include a table taken from the reports made to the State Board of Transportation by each of the companies, showing their net earnings per mile for the year 1893, as follows:

1893.

Name of Co.	No. miles.	Net per mile.
Burlington	2,253	$1,334.00
C. St. P., M. & O.	261	1,281.00
F., E. & M. V.	985	1,414.00
Union Pacific	467	5,440.00
O. & R. V.	414	144.00
St. Joe & G. I.	112	1,265 00
K. C. & O.	193	236.00

It thus appears in every instance the net earnings as shown from these tables, made by Mr. Dilworth, is less than the amount reported by the companies, except the O. & R. V., which is $28.46 less per mile, while the U. P. is $230 per mile more.

The average net earning per mile as reported by the U. P. and the three branches is $62.75 greater than was estimated by Mr. Dilworth. The Burlington is also $162.00 per mile greater than was estimated by Mr. Dilworth, and the F , E. & M. V. and the C., St. P., M. & O. average $6.63 per mile greater than estimated by Mr. Dilworth in these tables we have given.

Mr. Dilworth, in his evidence (page 977), gives, "Exhibit 19," a table, made up from these same reports, which shows the number of tons carried locally, average amount

received per ton, total amount received and carried locally, the amount received from passenger business, total amount received on inter-state freight. Also the amount received on business done in the State of Nebraska, and the total amount of the reduction, had the law in controversy been in force for the year 1893.

From these tables we have prepared the following table, showing the net per cent, total receipts, net earnings, and the reduction, had House Roll No. 33 been in operation during the year 1893:

1893.

	Net Per Cent.	Total Receipts.	Net Earned.	Reduction.
B. & M.	.3449	$8,554,920.00	$2,950,201.90	$366,512.00
Net earned under House Roll 33				$2,583,988.90

	Net Per Cent.	Total Receipts.	Net Earned.	Reduction.
C., St. P., M. & O.	.5042	$917,644.00	$462,676.10	$42,049.00
Net earned under House Roll 33				$420,627.10

	Net Per Cent.	Total Receipts.	Net Earned.	Reduction.
F., E. & M. V.	.4334	$3,053,283.00	$1,414,792.34	$125,208.00
Net earned under House Roll 33				$1,289,584.34

	Net Per Cent.	Total Receipts.	Net Earned.	Reduction.
U. P.	.4149	$5,865,081.00	$2,433,222.10	$122,045.00
Net earned under House Roll 33				$2,311,177.10

	Net Per Cent.	Total Receipts.	Net Earned.	Reduction.
O. & R. V.	.0596	$1,220,113.00	$73,718.00	$23,753.00
Net earned under House Roll 33				$48,756.73

	Net Per Cent.	Total Receipts.	Net Earned.	Reduction.
St. J. & G. I.....	.3795	$362,912.00	$137,635.90	$9,971.00

Net earned under House Roll 33 .....$127,664.90

	Net Per Cent.	Total Receipts.	Net Earned.	Reduction.
K. C. & O..	.0235	$177,491.00	$4,170.95	$2,786.00

Net earned under House Roll 33.....$1,384.95

1. In 1893, had the law in question been in force, the net earnings of the Burlington would have been.....$2,583,989.90

2. The Northwestern (C., St. P., M. & O. and F., E. & M. V.) in 1893 would have had a net earning under this law of.. .....$1,710,211.44

The U. P. and its subordinate lines would have had under this, net earnings amounting to.....$2,488,983.68

Thus it will be seen that, had the law in question been in force during the year, all three of these companies, and each of the subordinate branches would have earned a good, handsome profit over and above the operating expenses, without reference as to whether they were econimically managed or not, and without any reference to profits arising out of business which neither began nor ended in Nebraska, nor from the express business or the mail service.

EXHIBIT 9, PAGE 1291 SHOWS THAT IN 1893 THERE WAS 2253 MILES OF THE BURLINGTON ROAD IN NEBRASKA. ITS NET EARNINGS, HAD THE LAW IN QUESTION BEEN IN FORCE IN 1893,

EXCLUSIVE OF EARNINGS FROM EXPRESS OR MAIL OR FROM OTHER BUSINESS WHICH HAD ITS ORIGIN AND TERMINATION OUT OF THE STATE WOULD HAVE BEEN $1,146.90 PER EACH MILE OF ROAD IN THE STATE, OR EQUAL TO FIVE PER CENT. ON EVERY MILE AT $22,983.00 PER MILE WITHOUT REFERENCE AS TO HOW IT WAS MANAGED.

UNION PACIFIC.

THIS SAME EXHIBIT 9 SHOWS THERE WERE IN 1893, 467 MILES OF THE UNION PACIFIC, 414 MILES OF THE OMAHA & REPUBLICAN VALLEY, ST. JOSEPH & GRAND ISLAND 112 MILES, AND THE KANSAS CITY AND OMAHA 193 MILES, MAKING IN ALL 1186 MILES, WHICH WOULD HAVE EARNED UNDER THE LAW IN QUESTION IN 1893 $2,488,983.68, OR A NET EARNING PER MILE OF $2,098.68, EQUAL TO FIVE PER CENT. ON THE ENTIRE MILEAGE AT THE RATE OF $41,973.60 PER MILE, EXCLUSIVE OF ITS EARNINGS UPON THE MAILS AND EXPRESSAGE AND PASSENGER AND FREIGHT BUSINESS WHERE NEITHER THE POINT OF SHIPMENT OR DESTINATION IS IN NEBRASKA, AND WITHOUT REFERENCE TO ITS MANAGEMENT.

NORTH-WESTERN.

This same Exhibit 9 shows that in 1893 there was 261 miles of the Chicago, St. Paul, Minneapolis & Omaha Road in Nebraska, and 968 miles of the Fremont, Elkhorn & Missouri Valley in Nebraska, making in all 1129 miles;

which would have earned had the law in question been in force in 1893, a net profit of $1,710,211.44, or a net profit per mile of $1,391.71, equal to five per cent. on the entire mileage at $27,834.20 per mile, exclusive of earnings from the express business or from freight or passenger business where neither the point of origin nor point of destination is in Nebraska, and from the mail service and without reference to the management.

The foregoing statement shows:

1. That the operating expenses of the Burlington Company in 1893 was $5,604,328.10

2. That the operating expenses of the Union Pacific and its subordinate lines in 1893 was $4,312,850.00

3. That the operating expenses for the year 1893 of the subordinate lines of the Northwestern, the C., St. P., M. & O. and the F., E. & M. V. amounted to $2,093,258.56

How these enormous sums were expended does not appear. How this court can say, in the absence of evidence, as to how these enormous sums of money were expended, that the law in question amounts to either the taking of property without due process of law, or that it deprives these companies of the equal protection of the law, is a problem we are unable to solve.

BURLINGTON—COST OF:

Mr. Taylor, the treasurer, in his evidence (see Record, page 1300), gives the cost of this road and its branches in

Nebraska, as shown from its books, to have been on April 14, 1894, $62,934,591.73. It cost per mile, then, $27,933.65.

There was granted to this company (see page 971) in aid of its construction 3,512,960 acres of land, worth, as shown by the evidence, $15,808,320. There were municipal bonds voted (page 960), issued and delivered in aid of the construction of this railroad amounting to $396,000.00.

Total aid..... .....$16,204,320.00
Amounting per mile to..... 7,103.55

This would leave the actual cost to the company per mile $20,830.10, including rolling stock, stations, station-houses, and equipage of every kind.

UNION PACIFIC—COST OF:

Mr. Mink, on page 747, says: "On investigation, I find the contract price with H. M. Hoxie of September, 1864, was $50,000.00 for each and every mile of completed road, the contractor not to be required to expend for the erection of station buildings, machinery, machine-shops, equipments, etc., more than $5,000.00 per mile." Mr. Hoxie's contract covered the first 100 miles of road from Omaha west.

The evidence shows there are 467 miles of the Omaha and Ogden line in Nebraska. Mr. Oakes Ames had the contract for the balance in Nebraska. He had then the west 367 miles in Nebraska. Mr. Mink, on page 749, says, in speaking of the Ames contract: "The contract price was, first 100 miles $42,000.00 per mile, second 167 miles $45,000.00 per mile, and the third 100 miles $96,000.00 per mile.

The average contract price, then, for the 467 miles of the Omaha and Ogden line in Nebraska was $67,166 66 per mile. This includes rolling stock, stations, station-houses, machinery, and machine-shops—in fact, all equipments.

The evidence of Mr. House (pages 801 to 805) shows the first estimate of cost for the construction was $30,000.00 per mile; but the engineer, Mr. Dey, was instructed to increase it to $50,000.00 per mile—the amount of the Hoxie contract.

Then, on page 1164, being a part of the report to Congress of the Wilson committee, it appears: "The Chief Engineer, Peter A. Dey, resigned because the Hoxie contract was fixed at $50,000, though his estimates were for $30,000 per mile. His successor, General G. M. Dodge, was interested in contracts for the construction of the road as a stockholder of the Credit Mobilier. Oakes Ames, who was largely interested in the construction of the road, sold stock to members of Congress for prices much below the real value of the shares, his philosophy being that, although these particular congressmen had favored the Union Pacific road, they would take a livelier interest in its affairs if they were protecting their own property."

It appears from this same report (page 1153) that the building of the Omaha & Ogden line actually cost only $50,720,958.94, or $142,213.11 more than the net proceeds from the sale of the first-mortgage bonds and the Government bonds. It also appears on the same page of the evidence that the Credit Mobilier's profits on these contracts were $43,929,328.34. We also quote therefrom as follows (pages 1155 and 1156): "Sixth. The benefits arising from

the Hoxie contract were secured by an assignment to Thomas C. Durant, Cornelius S. Bushnell, Charles A. Lombard and H. S McComb (all directors of The Union Pacific Railroad Company), and Gray."

"The profits arising from the Ames contract were secured to the stockholders of the Credit Mobilier, and the contract itself was assigned, in trust, to Thomas C. Durant, Oliver Ames, John B. Alley, Sidney Dillon, Cornelius S. Bushnell, Henry S McComb and Benjamin E. Bates, all of whom were stockholders in the Union Pacific Railroad Company and in the Credit Mobilier. The profits arising from the Davis contract were secured to the Credit Mobilier stockholders by an assignment to the same trustees." Again, on page 1163, it is said: "With these legal obligations and covenants resting upon them, what did these Companies do? The Union Pacific Railroad Company actuall received, in cash, on account of stock payments, the sum of only $400,650, while it issued stock to the amount of $36,762,300.

The Union Pacific (1,036.68 miles) was built for $38,824,000, and the Company issued bonds and stocks as follows:

First mortgage bonds	$27,237,000
United States bonds	27,236,512
Land-grant bonds	9,224,000
Income bonds	9,355,000
Stock	39,762,300
	$109,814,812
Cost of construction	$38,824,000
Fictitious capital	70,990,812

One thing is evident. After allowing for discount, the road was built for less than the proceeds of the first mortgage and government bonds, which had a face value of $54,465,512, the builders taking as profit part of the proceeds of the sale of those bonds, as well as the income bonds, the lang-grant bonds, and the stock, and charging upon the books of the Company as cost of construction, $109,814,812.

The Wilson Committee reported that large sums of money were borrowed by the Corporation apparently to provide for the necessities of construction, but which were distributed in dividends among the Corporators; that stock was not paid for in money; that some of the Government Directors neglected their duties and others were interested in the fraudulent transactions of the Company. One of the Commissioners appointed to pass upon the condition of the road was paid $25,000 in consideration of his signing officially a report accepting as first-class a section of 120 miles of the road. * * * The testimony taken by the Wilson Committee showed that G. M. Dodge had been given, for services in procuring the passage of the Act of March 3, 1871, $24,500; that C. S. Bushnell had paid to T. A. Scott, on private account, $19,000; that C. S Bushnell had retained $82,500; that there was paid Governor John A. Dix, as a purchase by the Railroad Company of his stock, $50,000; that there was paid to C. Windell, for signing the report accepting a section of the road, $25,000; and that an allowance was made to T. C. Durant of $435,750.21 for expenses in passing through Congress the Amendatory Act of July 2, 1864." Again, it is said: (See Record page 1158) 'The evidence established the frequent use by the

officials of the Union Pacific Railway Company of money and passes for the purpose of influencing legislation. The vouchers relating to these expenses are, in many cases, insufficient. In all cases examined by the Commission, the evidence, while not disproving the purpose to which the moneys had been applied, had been sufficient to supply the defects of the vouchers. The witnesses called with reference to these transactions have established the fact that the general practice of the Company in Kansas, Nebraska and Colorado, was to secure a full representation at the Capitals of those States respectively during the sessions of the legislature."

It appears also, that the keeping up of the rolling stock, equipments, track machinery and machine shops, stations and all repairs are carried to operating expenses, according to the evidence.

The extract given by Mr. Mink from the Hoxie Contract at page 748, shows certificates of the Company were to be issued in payment for the construction, and to advance on bonds of the Government at 80 per cent. and land contract bonds 75 per cent., including what might be due on construction etc., and he also undertook to subscribe for capital stock of the Company, $500,000.

The Ames contract contained a provision (See Record page 749) whereby Ames was to be paid in cash; but if the Government bonds could not be sold at par value net, the first mortgage bonds at 90 cents net, then Ames was to be charged on the contract the difference between the amount realized and the above rates, provided the first bonds are not sold below 80 cents.

It is apparent from the provisions of these contracts, that they might have been constructed at a much less cost, had the contractors known the money was forth coming when the roads were constructed.

Mr. Mink says, page 722, there was granted in aid of the construction of the main line 7,853,000 acres of land. That the company has realized from sales $15,936,000.00, and that 3,297,000 acres remain unsold.

There must have been sold the 4,555,000 at an average of $3.50 per acre. At the same price the balance unsold would be $11,539,500, Total value of land $27,-475,500.00. This would be for the 1038 miles from Omaha to Ogden, per mile, $26,741.62.

There were government directors appointed, under the law, to look after the affairs of the Union Pacific Company, also commissioners to examine the construction of the roads, one of which was paid $25,000.00 to sign a certificate. Why then, may we not ask, should the patrons of this road be made to pay rates sufficient to pay interest upon this fictitious value as well as upon this fraudulent indebtedness above operating expenses and reasonable income for its fair value?

If the general government's agents were corrupt, or dishonest, or unfaithful to the trust reposed in them, ought it not to suffer the loss, rather than the patrons of this road, who had nothing to do or say other than in common with all the people of the United States? It seems to us these agents were the common agents of all the people and all in common, ought to sustain the loss of their unfaith-

fulness rather than the patrons of the road. This is both equity and justice.

As we have seen, the average contract price per mile was	$67,166.66
Dey estimate raised per mile	20,000.00
Actual	47,166.64

And as appears from extract from Hoxie and Ames contract 20 per cent. was excess. Deduct this and we have actual cost per mile $37,773.33.

As shown by Wilson committee the 1038 miles cost	$38,824,000.00
Or per mile	37,691.71

There exists no reason why in equity as between the corporation and the patrons, or between the general government and the patrons of this road, they should be required to pay rates sufficient to cover cost of construction without reference to lands granted in aid of the construction of these roads.

See 12, Statutes at Large, page 489. The title to the act is: "*An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes.*"

Section 3: "And it is further enacted, that there be and is hereby granted to the said company, *for the purpose of aiding in the construction of said railroad and telegraph line*, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores thereon every alternate section of public land."

The purpose of the grant was, "*for the purpose of aiding in the construction* * * * to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores thereon." Then by section 6 of the original act the grant is made conditional, and in case of breach the right is reserved to the general government to take possession of the road equipments, etc., and unsold land.

It is clear from these provisions of the law that a gift in fact was not contemplated.

If this was a condemnation proceeding, the company having the legal title, the question as to how it came by it could not be questioned; but this is not.

These are actions in equity to ascertain whether the rates fixed by the law are so unreasonable as to be repugnant to the Fourteeenth Amendment to the Constitution.

The patrons, then, as part of the whole people, contribute these lands in aid of the construction of these lines, for the purposes expressed in the act; and there exists no equitable principle whereby these corporations should reap all the benefit therefrom. Deducting, then, the value of these lands and the actual cost of the road to the corporation.

Cost per mile by contract	$37,691.75
Less land grant per mile	26,471.62
Actual cost per mile	11,220.13

On page 735 Mr. Mink says, in speaking of the Omaha & Republican Valley road: "The book account cost of the road and its equipment was $8,666,002.69. On page 734 he says there are 482 miles of this road. Its book account cost, then, was, per mile, $17,978. There is no evidence in

the Record from which the cost of the St. Joseph & Grand Island Railroad can be ascertained. The amount of its capital stock and bonded indebtedness is given; but this is not evidence of the cost of its construction and equipment. Neither is there any evidence as to the cost of the Kansas City & Omaha road. It will be presumed that this evidence was not furnished because of its tendency to disprove the allegations of the bill. But there is evidence showing these two branches are built through substantially the same character of country.

It is at least fair, then, to assume these roads, in their construction and equipment, did not cost more per mile than did the Omaha & Republican Valley—that is, $17,987 per mile. This would give us 467 miles of the Omaha & Ogden line of the Union Pacific at an actual cost, aside from lands granted in aid of, at per mile of $37,691.75, and 719 miles of the three branches, viz.: Omaha & Republican Valley, The St. Joseph & Grand Island, and The Kansas City & Omaha, at a cost per mile of $17,987, or an average per mile of $25,827.34. There was also a land grant in aid of St. Joseph & Grand Island of 1,700,000 acres, worth $5,950,000—at same rate the Union Pacific's lands sold for —as shown by the evidence.

Add to this municipal aid of.....	$ 915,700.00
It would give a total of.....	6,865,700.00
Add to this sum of $6,865,700 the Union Pacific land-grant amount of.....	27,475,500.00
Total aid per mile of the entire system in Nebraska.....	34,341,200.00
An average for the 1186 miles of the Union Pacific system in Nebraska, per mile....	29,015.18

So that the actual cost of the 467 miles of the Omaha & Ogden line, the 414 miles of the Omaha and Republican Valley, the 112 miles of the St. Joseph & Grand Island, and the 193 miles of the Kansas City & Omaha line was, per mile, $3,187.84 less on average than the aid granted in the construction of these lines in lands and municipal bonds. Yet, notwithstanding, we have shown that, had the law in question been in force during the year ending June 30, 1893, the Union Pacific in Nebraska, the Omaha & Republican Valley, the St. Joseph & Grand Island and the Kansas City & Omaha would have had a net earning of $2,488,983.68—an average for the 1186 miles of road per mile of $2,098 68.

The North-Western Cost of:

The evidence shows, page 1261, Exhibit 13, the Fremont, Elkhorn & Missouri Valley Railroad has 985 miles of railroad in Nebraska. Exhibit 9, page 1291, shows the Chicago, St. Paul, Minneapolis & Omaha Railroad had 261 miles in Nebraska. It makes a total of 1,246 miles of this system in Nebraska. There is wanting in the record any evidence tending to show what the original cost of the construction of these lines were either in total, or per mile, nor is there any evidence or data given from which it can be ascertained. The evidence does show that the Fremont, Elkhorn & Missouri Valley Railroad Company obtained a land-grant of 100,030 acres, the Omaha & North-Western, 80,485 acres, the Columbus, Niobara & Black Hills, 100,000 acres, making a total of 280,515 acres granted to these Companies, which now form a part of these two lines. Mr. Dilworth testifies that these lands were reasonably worth $4.50 an acre, making total value of land granted, $1,262,-

327. The amount of land-grants to these Companies will be found in the evidence on pages 965 and 966, exhibit 18, page 971. The evidence further shows that these Companies received municipal aid in Nebraska to the amount of $540,500. This, added to the value of land, would make a total of $1,802,827.00, or aid to the amount of $1,452 per mile. Now, assuming that it cost as much to build these two branches of the North-Western system as it did to build the Omaha & Republican Valley, according to the Union Pacific book account, and this is a fair assumption, for the evidence shows that they are both built through the same character of country, then we would have the North-Western system costing per mile..... $17,978.75
Less aid per mile..... 16,535.75
Had law in question been in force in 1893 we have shown its net earnings would have been.....$1,710,221.44
Or a net earning per mile of..... 1,378.09
Or a per cent. of .0763 upon the..... $17,978.75
per mile cost without any reference whatever to aid.

As to the Sioux City & Pacific, see page 1194:

"The engineer estimates that the Sioux City & Pacific can be reproduced for about $22,000 per mile. Yet Mr. Marvin Hughitt, of Chicago, the President of the Chicago & North-Western Railroad Company and the Sioux City & Pacific Railroad Company, told the Commission that he could duplicate the Sioux City & Pacific line for $9,000 a mile. Recently the track of the Sioux City & Pacific was appraised by two eminent engineers, for the purpose of fixing the rental which the Fremont, Elkhorn & Missouri Valley

Railroad should pay for passing over thirty-one miles of the track of the Sioux City & Pacific, and that appraisement fixed the present value of that section at about $11,000 per mile. It was the most expensive portion of the line of the Sioux City & Pacific."

"Mr. Jay Gould told the Commission that he was building roads at a cost of $9,000 per mile, and related how he had proposed to the directory of the Union Pacific, shortly after the passage of the Thurman bill, to duplicate or parallel the main line of the Union Pacific from Omaha to Ogden for $15,000,000." From this extract, we not only have the statement of Mr. Hughitt, the president of the North-Western, that he could reproduce the Sioux City & Pacific at $9,000.00 per mile, but the statement of Mr. Gould that he was actually building roads in this country at $9,000.00 per mile. The most important of all, however, is the way the railroad managers themselves ascertain the rental value of the roads; and that is by appraising its present value. This puts it upon the same basis as other property. That rental of the Sioux City & Pacific is upon a basis of an appraised value of $11,000 00 per mile. No one can doubt the fact that the Sioux City & Pacific is of as much value as the Fremont, Elkhorn & Missouri Valley Railroad. Its fair rental value, then, is $11,000.00 per mile. This must follow, or the one company would not have leased its road, nor would the other company have been willing to have leased it. Had the law in question been in force in 1893, this leased line would have paid per mile, as we have seen, $1,378.09, or interest upon its rented value of .1252 per cent. Certainly not unreasonable. It must be borne in mind that this income does not include any earnings

either from freight or passenger business, where both the points of origin and destination are without the State; nor does it include any income from the carrying of the mails or from the express carried by any of these railroad companies.

What does the evidence show the reasonable present value of these several railroads to be?

This we believe to be the true basis upon which reasonable rates must be established.

We will first take up the Union Pacific main line from Omaha to Ogden, according to the estimate just shown, is per mile.....	$ 36,683.62
House estimate (See Record pages 834 and 835)	18,160.00
Wakefield's estimate (See Record page 1204)...	18,497.16
Mr. Peter A. Dey, one of the Railroad Commissioners of Iowa, and the original engineer of the Union Pacific, estimates the same (See Record pages 1194 and 1195) Union Pacific could be paralleled and equipped to-day for per mile.....	25,000.00
Estimate of Richard P. Morgan, Jr., Inspecting Engineer for the United States Pacific Railway Commission, under the Act of March 3rd, 1887, (See Record page 1149) cost per mile Union Pacific system Omaha to Ogden.....	26,814.00

Mr. T. E. Calvett's evidence was taken in rebuttal, who is Superintendent of the Burlington Company in Nebraska. In his evidence he was questioned as to the estimate made by Mr. Wakefield, and con-

cludes at page 1257 by saying: "That would be $480 a mile." That is, he would, by reason of extra costs, over Mr. Wakefield, increase the cost per mile.....	480.00
His estimate, then, would be.....	18,977.16
Cost of building 147.53 miles of the Missouri Pacific in Kansas and Nebraska. See Record page 832. Total cost 147.53 miles and 9.5 siding.....	2,486,559.82
Per mile, including siding.....	15,201.01
This is without equipments. He then places the equipments (See Record page 835) at.	6,328.16
Total.....	21,529.17
FROM THIS EVIDENCE IT APPEARS THAT A LIBERAL ESTIMATE OF THE PRESENT VALUE OF THE OMAHA AND OGDEN LINE WOULD BE PER MILE.....	25,000.00
TAKING THE THREE SUBORDINATE BRANCHES AT THEIR BOOK ACCOUNT COST PER MILE OF.....	17,987.75
THE AVERAGE COST THEN OF THE 1183 MILES OF THE UNION PACIFIC SYSTEM IN NEBRASKA WOULD BE PER MILE.....	20,743.40
WE HAVE SEEN THIS SYSTEM IN 1893 WOULD HAVE EARNED PER MILE, HAD THE LAW IN QUESTION BEEN IN FORCE.....	2,098.68
ABOUT TEN PER CENT NET ON ITS PRESENT VALUE.	

THE BURLINGTON COMPANY'S RAILROAD COULD CERTAINLY BE REPRODUCED, TOGETHER WITH ITS EQUIPAGE, FOR WHAT THE MISSOURI PACIFIC COST. THE EVIDENCE GIVEN BY MR. TAYLOR SHOWS ITS EQUIPAGE TO BE LESS THAN MR. HOUSE PUT THE EQUIPAGE OF THAT ROAD. TAKING THIS, THEN, AS THE PRESENT REASONABLE VALUE OF THE BURLINGTON, WE WOULD HAVE ITS PRESENT VALUE PER MILE.....	21,596.17
ITS NET EARNINGS IN 1893, HAD LAW IN QUESTION BEEN IN FORCE, WOULD HAVE BEEN PER MILE.....	1,104.74
A NET PROFIT of .051154 PER CENT UPON THE PRESENT VALUE OF THE ENTIRE BURLINGTON SYSTEM IN NEBRASKA.	

The above per cent. of profits upon the present value of the several roads does not include any earnings from strictly through business; that is, passenger or freight business whose points of origin and points of destination are without the State of Nebraska. Nor does it include any earnings from the carrying of the mails or of express-age. Neither does it take into consideration the fact as to whether the gross expenditures were necessary and reasonable or not. And we contend that it is not the province of this court to assume, in the absence of evidence, or in the light of the evidence, in the Record in these cases, that

such enormous expenditures, as the evidence shows was made, were the result of economical management of the several companies, and thereupon hold the law in question to be repugnant to the Constitution of this State or of the United States.

VI.

The real objection to the law in question on the part of the complainants below, and of the several railway companies, does not consist so much in the amount of the reduction of their earnings as it does in the fact that this law, if held valid, will deprive the companies of the possibility of making preference to favored parties and friendly localities, and make up such deficit by charging higher rates to less favored parties and communities.

An examination of the evidence of Mr. Utt, whose evidence was taken on behalf of the complainants below and in the interest of the companies, as to the method in which railway companies make up freight rates and conduct their business, shows this to be the fact at every page. The evidence of Mr. Fink, whose testimony was taken on behalf of the complainants, where it relates to the manner of making up freight rates and the method of the railroads in doing business, shows that favoritism both to individuals and communities is indulged in at every hand by the management of the several companies. In fact, the Record is full of discrimination and favoritism, the giving of preference to elevator-men, to smelting-works, to the stone trade from Wyoming, and in the interests of the California sugar merchants, and in numerous other ways, as well as by constructive mileage and every other method known to rail-

road management in the dispensing of its patronage and favoritism. The effect of such favoritism and discrimination upon communities and individuals is clearly pointed out in the evidence of Mr. Dilworth, one of the secretaries of the State Board of Transportation. So plainly is this manifest throughout the entire Record that one can scarcely read the evidence of any witness whose evidence was taken on behalf the complainants below without being forcibly impre l with its outcreepings at every hand—while these companies are engaged in a business which is, to say the least, quasi-public, and should be conducted upon principles of equality to all and favoritism to none, giving to each community and to each individual equal opportunities and equal facilities.

A. S. CHURCHILL,

Attorney-General of Nebraska.

Office Supreme Court U.S.
FEB 29 1896
JAMES H. McKENNEY,
CLERK.

of Webster for Appellan

reme Court of the United States,

OCTOBER TERM, 1895.

d Feb 29, 1896.

No. 687.

R S. CHURCHILL, ATTORNEY GENERAL; JOEL A. R, SECRETARY OF STATE; EUGENE MOORE, AUDITOR PUBLIC ACCOUNTS; JOSEPH S. BARTLEY, STATE TREASURER, AND HENRY C. RUSSEL, COMMISSIONER OF PUBLIC LANDS AND BUILDINGS OF THE STATE OF NEBRASKA, CONSTITUTING THE BOARD OF TRANSPORTATION OF THE STATE OF NEBRASKA, ET AL.,
Appellants,

vs.

VER AMES, OAKES AMES, FRANK M. AMES, ET AL.

No. 696.

R S. CHURCHILL, ET AL., CONSTITUTING THE BOARD OF NSPORTATION OF THE STATE OF NEBRASKA, ET AL.,
Appellants,

vs.

ORGE SMITH, CHARLES P. GOODRICH, LAWRENCE MINOT, ET AL.

No. 697.

R S. CHURCHILL, ET AL., CONSTITUTING THE BOARD RANSPORTATION OF THE STATE OF NEBRASKA, ET AL.,
Appellants,

vs.

RY L. HIGGINSON, ROBERT H. GARDNER, WILLIAM C. WELLS, ET AL.

s from the Circuit Court of the United States for the District of Nebraska.

A. S. CHURCHILL,
W. A. DILWORTH,
Sol's. for Appellants.

L. WEBSTER,
Of Counsel.

Baker, Printer, N. Y. Life Building, Omaha.

preme Court of the United States,

OCTOBER TERM, 1895.

No. 685.

THUR S. CHURCHILL, ATTORNEY GENERAL; JOEL A. IPER, SECRETARY OF STATE; EUGENE MOORE, AUDITOR OF PUBLIC ACCOUNTS; JOSEPH S. BARTLEY, STATE TREASURER, AND HENRY C. RUSSEL, COMMISSIONER OF PUBLIC LANDS AND BUILDINGS OF THE STATE OF NEBRASKA, CONSTITUTING THE BOARD OF TRANSPORTATION OF THE STATE OF NEBRASKA, ET AL.,
Appellants,

vs.

LIVER AMES, OAKES AMES, FRANK M. AMES, ET AL.

No. 686.

THUR S. CHURCHILL, ET AL., CONSTITUTING THE BOARD OF RANSPORTATION OF THE STATE OF NEBRASKA, ET AL.,
Appellants,

vs.

GEORGE SMITH, CHARLES P. GOODRICH, LAWRENCE MINOT, ET AL.

No. 687.

THUR S. CHURCHILL, ET AL., CONSTITUTING THE BOARD F TRANSPORTATION OF THE STATE OF NEBRASKA, ET AL.,
Appellants,

vs.

ENRY L. HIGGINSON, ROBERT H. GARDNER, WILLIAM C. WELLS, ET AL.

eals from the Circuit Court of the United States for the District of Nebraska.

Filed August 3, 1895.

(15975, 15976, 15977.)

E NEBRASKA MAXIMUM FREIGHT RATE CASES.

ef for Appellants, The State Board of Transportation.

STATEMENT OF THE CASE.

The Legislature of the State of Nebraska passed a l
which was approved April 12th, A. D., 1893, and frequen
designated in the record as House Roll No. 33, the mate
parts of which are as follows:

"AN ACT to regulate railroads, to classify freights, to
reasonable maximum rates to be charged for the transportati
of freights upon each of the railroads in the state of Nebras
and to provide penalties for the violation of this act."

Be it Enacted by the Legislature of the State of Nebrask

"Sec. 1. The provisions of this act shall apply, exce
as in this act otherwise provided, to all railroad corporatio
and railroad companies, and to any common carrier or carri
engaged in this state in the transportation of freight by ra
road therein, and shall also be held to apply to shipments
property made from any point within the State to any oth
point within the State. The term 'railroad' as used in th
act shall include all bridges and ferries used or operated
connection with any railroad, and also all the road in use
any corporation, receiver, trustee, or other person operating
railroad, whether owned or operated under contract, agre
ment, lease, or otherwise, and the term 'transportation' sh
include all instrumentalities of shipment or carriage, and t
term 'railroad corporation,' contained in this act shall
deemed and taken to mean all corporations, companies,
individuals now owning or operating, or which may hereaft
own or operate any railroad, in whole or in part, in this sta
and the provisions of this act, except as in this act otherwi
provided, shall apply to all persons, firms, and companies, a
to all associations of persons, whether incorporated or othe
wise, that shall do business as common carriers of freig
upon any of the lines of railway in this state, the same as
railroad corporations herein mentioned.

"Sec. 2. That all freight or property to be transport
by any railroad company or companies mentioned in the pr
ceding section, from any point in the State of Nebraska
any other point in said State, shall be classified as hereinaft
in this section provided, and any other or different classificati
of freight, which would raise the rates on class or commodi

of freights above the rates prescribed in this act, except as hereinafter otherwise provided, is prohibited and declared to be unlawful. The classification established by this act shall be known as the 'Nebraska Classification.' Freights shall be billed at the actual weight, unless otherwise directed in the classification. Twenty thousand pounds shall be a car load and all excessive weights shall be at the same rate per hundred pounds, except in car loads of light and bulky articles, and unless otherwise specified in this classification. When the classification makes an article 'released' or 'owner's risk' the same at carrier's risk will be the next rate higher, unless otherwise provided in the classification. Articles rated first class, 'released' or owner's risk, if taken at 'carrier's risk,' will be one and one-half times first class, unless otherwise provided in the classification. All articles carried according to this classification at 'owner's risk' of fire, leakage, damage, or breakage, must be so receipted for by agents, of the railroad, and so considered by owners and shippers. Signing a release contract by a shipper shall not release the railroad company for loss or damages caused by carelessness or negligence of its employes."

The Nebraska Classification, Explanation of Characters.

"The class is given opposite each article. 1, 2, 3, 4, and 5, stand for first, second, third, fourth and fifth classes respectively; 1½ for one and one-half first-class, D 1 for double first-class, 2½ for two and one-half times first-class, 3 t 1 for three times first-class, 4 t 1 for four times first-class, O. R. for owner's risk, C. R. for carrier's risk, S. U. for set up, K. D. for knocked down, C. L. for car load; L. C. L. for less than car load, P. P. for prepaid, N. O. S. for not otherwise specified in this classification; classes A, B, C, D, and E, refer to table of rates.

"The figures or letter in the first column to the right of the various articles in the classification refer to less than our load lots and those in the second column refer to the rate in car load lots."

(Then follow detailed lists of articles under each classification, in car load, and less than car loads.)

"Sec. 3. That each of the railroads in the state of Ne-

braska shall charge, for the transportation of freight from any point in said state to any other point in said state, no higher or greater rate of charge, than is by this act fixed as the reasonable maximum rates for the distance hauled and the reasonable maximum rates for the transportation of freight by railroad from any point in the state of Nebraska to any other point in said state, are declared and established to be as hereinafter in this section fixed for the distance named and any higher or greater rate for the distance hauled than that herein fixed and established, is prohibited and declared to be unlawful; and the reasonable maximum rate herein fixed and established shall be known as the Nebraska Schedule of Reasonable Maximum Rates.

NEBRASKA SCHEDULE OF REASONABLE MAXIMUM RATES.

MERCHANDISE RATES, IN CENTS PER 100 POUNDS.

Miles.	1st Class.	2nd Class.	3d Class.	4th Class.
5	13	11	9	7
10	15	12.5	10	7.4
15	16	14	10.5	8.5
20	16.5	14.5	11	9
25	17	15	11.7	9.5
30	18	15.5	12.2	10
35	20	16	13	10
40	22	17	14	11
45	22	18	14	11
50	24	19	14.5	12
55	24	20	15	12
60	24	21	16	13
65	26	22	17	14
70	27	23	17.5	15
75	28	23	18	16
80	28	23.5	18.5	17
85	28	24	19	18
90	29	24	19.5	18
95	29	24.5	20	19
100	29	25	21	20
105	29.5	25.5	21.5	20.5

Miles	1st Class	2d Class	3d Class	4th Class
110	29.5	26	22	21
115	30	27	24	21.5
120	32	29	26	22
125	32	30	27	22
130	34	31	28	22
135	35	33	29	22.5
140	37	34	30	23
145	39	35	31	23.5
150	41	36	32	24
155	42	38	34	26
160	44	40	36	28
165	46	41	37	30
170	48	42	38	32
175	48	43	39	32.5
180	48	44	40	33
185	50	45	40.5	33.5
190	52	46	41	34
195	53	47	42	35
200	55	48	43	36
210	55.5	49	44	37
220	56	50	45	38
230	57	51	45.5	39
230	58	52	46	40
250	58.5	53	47	41
260	59	54	48	42
270	60.5	54	49.5	43
280	62	56	51	44
290	62	56.5	51.5	45
300	62	57	52	46
310	63	57.5	53	47
320	64	58	54	48
330	65	59	55	49
340	66	61	56	50
350	69	62	57.5	51
360	72	63	59	52
370	72.5	63.5	59.5	53
380	73	64	60	54
390	73.5	65	61	55
400	74	66	62	56
410	77	68	63	57
420	80	70	64	58

Miles	1st Class	2d Class	3d Class	4th Clas
430	82	72	65	59
440	84	74	66	60
450	86	76	67	61
460	88	78	68	62
470	90	80	69	63
480	92	82	70	64
490	94	84	71	65
500	96	86	72	66

SPECIAL CARLOAD CLASSES, IN CENTS PER 100 POUNDS.

Miles	5th Class	Class A	Class B	Class C	Class D	Clas E
5	5	5	4	3	3	2
10	6	6	5	4	3	2
15	6	7	6	5	4	2
20	7	8	6	5	4	2.
25	7	8	6	5	4	2.
30	8	8	6	5	4	2.
35	9	9	7	6	5	3
40	10	10	7	6	5	3.
45	10	10	7	6	5	3.
50	10	10	8	7	6	3.
55	10	10	8	7	6	4
60	10	11	8	7	6	4
65	11	11	9	7	6	4
70	12	12	9	8	6	4
75	12	12	9	8	6	4
80	13	13	9	8	6	4.
85	14	14	10	9	7	5
90	14	14	10	9	7	5.
95	15	15	10	9	7	5.
100	16	16	11	9	7	6
105	16.5	16.5	11	9.5	7	6
110	17	17	11	10	7	6
115	17.5	17.5	11.5	10.5	7.5	6
120	18	18	12	11	8	6
125	19	19	12.5	11	8	6
130	20	20	13	11	8	6
135	20	20	13	11.5	8	6
140	20	20	13	12	8	6

Miles	5th Class	Class A	Class B	Class C	Class D	Class E
145	21	22	13.5	12.5	8.5	6.5
150	22	23	14	13	9	6.5
155	23	23	14.5	13.5	9.5	6.5
160	24	24	15	14	10	6.5
165	25	25	15	14	10	6.5
170	26	26	15	14	10	6.5
175	27	27	15.5	14.5	10.5	7
180	28	28	16	15	11	7
185	29	28	17	15.5	11	7
190	30	28	18	16	11	7
195	30.5	28.5	19	16.5	11.5	7.5
200	31	29	20	17	12	8
210	31.5	29	20.5	17	12	8.5
220	32	29	21	17	12	9
230	33	29.5	21.5	17.5	12.5	9.5
240	34	30	22	18	13	10
250	35	30.5	22.5	18.5	13.5	10
260	36	31	23	19	14	10.5
270	37	31.5	24	19.5	14	10.5
280	38	32	25	20	14	11
290	38.5	32	25.5	20	14.5	11.5
300	39	32	26	20	15	12
310	39	32.5	26.5	20.5	15.5	12.5
320	39.5	33	27	21	16	13
330	39.5	33.5	27.5	21.5	16.5	13
340	40	34	28	22	17	13.5
350	40	35	29	23	17.5	15.5
360	40	36	30	24	18	14
370	40	37	31	25	18.5	14.5
380	40	38	32	26	19	15
390	41	39	33	26.5	19.5	15.5
400	42	40	34	27	20	16
410	43	41	34.5	27.5	20.5	16.5
420	44	42	35	28	21	17
430	45	43	35.5	28.5	21.5	17.5
440	46	44	36	29	22	18
450	47	45	36.5	29.5	22.5	18.5
460	48	46	37	30	23	19
470	49	47	37.5	30.5	23.5	19
480	50	48	38	31	24	19
490	51	49	38.5	31.5	24.5	19
500	52	50	39	32	25	19

CARLOAD CLASSES, IN CENTS PER HUNDRED POUNDS.

MILES	Wheat Flour Millet Flax Seed	Corn, Oats, Barley and other Grains and Mill Stuffs	Hard and Soft Lumber, Laths, Shingles, Doors, Sash and Blinds	Salt Lime Cement Stucco
5	4	4	4	3
10	4	4	4	3
15	4½	4½	4½	3
20	5	5	5	3½
25	5	5	5	3½
30	5½	5½	5½	4
35	6	6	6	4½
40	6½	6½	6½	5
45	7	7	7	5½
50	7	7	7	5½
55	7	7	7	5½
60	7½	7	7	5½
65	8	7	7	5½
70	8½	7½	7½	6
75	9	8½	8	6
80	9½	8½	8	6½
85	10	8½	8	6½
90	10.5	8.5	6	8.3
95	10.5	9	6	8.6
100	10.5	9	6	9
105	10.05	9.5	6	9.3
110	11	10	6.5	9.6
115	11	10	6.5	9.9
120	11	10	7	10.2
125	11.5	10	7.5	10.5
130	12	10	8	10.8
135	12	10	8.5	11
140	12	10	9	11.3
145	12.5	10.5	9	11.5
150	13	11	9	12
155	13	11	9.5	12.1
160	13	11	10	12.2
165	13.5	11.5	10.5	12.3
170	14	12	11	12.4
175	14	12	11	12.5
180	14	12	11	12.6
185	14	12	11	12.7
190	14	12	11	12.8
195	14	12.5	11	12.9

CARLOAD CLASSES, IN CENTS PER HUNDRED POUNDS.

MILES	Wheat Flour Millett Flax Seed	Corn, Oats, Barley and other Grains and Mill Stuffs	Hard and Soft Lumber, Laths Shingles, Doors, Sash and Blinds	Salt Lime Cement Stucco
200	14	13	11	13
210	14.5	13	11.5	13.5
220	14.5	13	12	14
230	14.5	13	13	14.5
240	14.5	13	14	15
250	14.5	13.5	14.5	15.5
260	14.5	14	15	16
270	14.5	14	15.5	16.5
280	15	14	16	17
290	15	14	16.5	17.5
300	16	14	17	18
310	16	14	17.5	18.5
320	16	14	18	19
330	16.5	14.5	18.5	19.5
340	17	15	19	20
350	17	15	19.5	20.5
360	17	15	20	21
370	17.5	15.5	20.5	21.5
380	18	16	21	22
390	18	16	21.5	22.5
400	18	16	22	23
410	18.5	17	22.5	24
420	19	18	23	25
430	19.5	18	23.5	26
440	20	18.5	24	28
450	20.5	19	24.5	29
460	21	19.5	25	30
470	21	19.5	25.5	31
480	21.5	19.5	26	33
490	21.5	20	26.5	34
500	22	20	27	35

LIVE STOCK, IN DOLLARS, PER CAR. THIRTY-ONE (31) FOOT CARS INSIDE MEASUREMENT.

Miles	Horses and Mules in car loads Min. weight 20,000 lbs.	Fat Cattle in car loads Min. weight 19,000 lbs.	Hogs, (single deck) in car loads, Min. weight 15,000 lbs.	Sheep, (single deck) in car loads, Min. weight 10,000 lbs.
5	10.75	9.75	8.50	8.40
10	11.50	10.50	9.00	8.80
15	12.25	11.25	9.50	9.20
20	13.00	12.00	10.00	9.60
25	13.75	12.75	10.50	10.00
30	14.50	13.50	11.00	10.40
35	15.25	14.25	11.50	10.80
40	16.00	15.00	12.00	11.20
45	16.75	15.75	12.50	11.60
50	17.50	16.50	13.00	12.00
55	18.25	17.00	13.50	12.40
60	19.00	17.50	14.00	12.80
65	19.75	18.00	14.50	13.20
70	20.50	18.50	15.00	13.60
75	21.25	19.00	15.50	14.00
80	22.00	19.50	16.00	14.40
85	22.75	20.00	16.50	14.80
90	23.50	20.50	17.00	15.20
95	24.25	21.00	17.50	15.60
100	25.00	21.50	18.00	16.00
105	25.50	21.90	18.30	16.30
110	26.00	22.30	18.60	16.60
115	26.50	22.70	18.90	16.90
120	27.00	23.10	19.20	17.20
125	27.50	23.50	19.50	17.50
130	28.00	23.90	19.80	17.80
135	28.50	24.30	20.10	18.10
140	29.00	24.70	20.40	18.40
145	29.50	25.10	20.70	18.70
150	30.00	25.50	21.00	19.00
155	30.50	25.90	21.30	19.30
160	31.00	26.30	21.60	19.60
165	31.50	26.70	21.90	19.90
170	32.00	27.10	22.20	20.20
175	32.50	27.50	22.50	20.50
180	33.00	27.90	22.80	20.80

Miles	Horses and Mules in car loads Min. weight 20,000 lbs.	Fat Cattle in car loads Min. weight 19,000 lbs.	Hogs (single deck) in car loads, Min. weight 15,000 lbs.	Sheep, (single deck) in car loads, Min. weight 10,000 lbs.
185	33.50	28.30	23.10	21.10
190	34.00	28.70	23.40	21.40
195	34.50	29.10	23.70	21.70
200	35.00	29.60	24.00	22.00
210	35.75	30.40	24.80	22.30
220	36.50	31.30	25.60	22.70
230	37.25	32.20	26.40	23.10
240	38.00	33.10	27.20	23.50
250	38.75	34.00	28.00	23.90
260	39.50	34.90	28.80	24.30
270	40.25	35.80	29.60	24.70
280	41.00	36.70	30.40	25.10
290	41.75	37.60	31.20	25.50
300	42.50	38.50	32.00	25.90
310	43.20	39.00	32.50	26.70
320	43.90	39.50	33.00	27.10
330	44.60	40.00	33.50	27.50
340	45.30	40.50	34.00	27.90
350	46.00	41.00	34.50	28.30
360	46.70	41.50	35.00	28.70
370	47.40	42.00	35.50	29.10
380	48.10	42.50	36.00	29.50
390	48.80	43.00	36.50	29.90
400	49.50	43.50	37.00	30.31
410	50.20	44.00	37.50	30.74
420	50.90	44.50	38.00	31.18
430	51.60	45.00	38.50	31.62
440	52.30	45.50	39.00	32.06
450	53.00	46.00	39.50	32.50
460	53.70	46.50	40.00	32.94
470	54.40	47.00	40.50	33.38
480	55.10	47.50	41.00	33.82
490	55.80	48.00	41.50	34.26
500	56.50	48.50	42.00	34.70

COAL IN CENTS PER TON OF 2,000 LBS.

Miles	Hard Coal	Soft Coal Lump and Nut	Soft Coal Pea and Slack
5	.60	.30	.25
10	.64	.34	.28

Miles	Hard Coal	Soft Coal Lump and Nut	Soft Coal Pea and Slack
15	.68	.38	.31
20	.72	.42	.34
25	.76	.46	.37
30	.80	.50	.40
35	.84	.54	.43
40	.88	.58	.46
45	.92	.62	.49
50	.96	.66	.52
55	1.00	.70	.55
60	1.04	.74	.58
65	1.08	.78	.60
70	1.12	.82	.62
75	1.16	.85	.64
80	1.20	.88	.66
85	1.24	.91	.68
90	1.28	.94	.70
95	1.32	.97	.72
100	1.36	1.00	.74
105	1.40	1.015	.755
110	1.44	1.03	.77
115	1.48	1.045	.785
120	1.52	1.06	.80
125	1.55	1.075	.815
130	1.58	1.09	.83
135	1.61	1.105	.845
140	1.64	1.12	.86
145	1.67	1.135	.875
150	1.70	1.15	.89
155	1.73	1.165	.905
160	1.76	1.18	.92
165	1.79	1.195	.935
170	1.82	1.21	.95
175	1.85	1.225	.965
180	1.88	1.24	.98
185	1.91	1.255	.995
190	1.94	1.27	1.01
195	1.97	1.285	1.025
200	2.00	1.30	1.04
210	2.04	1.32	1.06
220	2.08	1.34	1.08
230	2.12	1.36	1.10

Hard Coal	Soft Coal Lump and Nut	Soft Coal Pea and Slack
2.16	1.38	1.12
2.20	1.40	1.14
2.24	1.42	1.16
2.28	1.44	1.18
2.32	1.46	1.20
2.36	1.48	1.22
2.40	1.50	1.24
2.44	1.52	1.25
2.48	1.54	1.26
2.52	1.56	1.27
2.56	1.58	1.28
2.61	1.60	1.29
2.64	1.62	1.30
2.68	1.64	1.31
2.72	1.66	1.32
2.76	1.68	1.33
2.80	1.70	1.34
2.84	1.72	1.35
2.88	1.74	1.36
2.92	1.76	1.37
2.96	1.78	1.38
3.00	1.80	1.39
3.04	1.82	1.40
3.08	1.84	1.41
3.12	1.86	1.42
3.16	1.88	1.43
3.20	1.90	1.44

"Sec. 4. All railroads or parts thereof which have been lt in this state since the 1st day of January, 1889, or may built before the 31st day of December, 1899, shall be ex- ot from the provisions of this act until the 31st day of De- ber, 1899.

"Sec. 5. Whenever any railroad company or companies his state shall, in a proper action show by competent testi ny that the schedule of rates prescribed by this act are un- and unreasonable, such railroad or railroads shall be ex- ot therefrom as hereinafter provided. All such actions shall brought before the Supreme Court, in the name of the rail- d company or companies bringing the same, and against the e of Nebraska, and upon the hearing thereof, if the court

R. R. Co's. have remedy by suit In Supreme Court of state.

shall become satisfied that the rates herein prescribed are unjust in so far as they relate to the railroad bringing the action, may issue their order directing the board of transportation to permit such railroad to raise its rate[illegible] any sum in the discretion of the board; *Provided*, That in no case shall the rates so raised be fixed at a higher sum than that charged by such railroad on the 1st day of January, 1893. Whenever any railroad company in this state shall claim the benefit of the provisions of this section, it shall be the duty of such railroad company to show to the court all matters pertaining to the management thereof, and if it shall appear that said railroad company is operating branch lines of railroad in connection with its main line, and all included in one system, then, in that case, it shall be the duty of the railroad company to show to the court upon which branch or branches, or upon which portion of such system the schedule of rates prescribed in this act is unjust and unreasonable, and only such portions shall be exempted from the provisions thereof; *Provided*, That in no case shall a railroad company be allowed to pool the earnings of all the lines operated under one management, where more than one line is so operated, for the purpose of lowering the general average.

"Sec. 6. That the board of transportation is hereby empowered and directed to reduce the rates on any class or commodity in the schedule of rates fixed in this act, whenever it shall seem just and reasonable to a majority of said board so to reduce any rate; and said Board of Transportation is hereby empowered and directed to revise said classification of freight as hereinbefore in this act established, whenever it shall appear to a majority of said board just and reasonable to revise said classification. *Provided*: That said board of transportation shall never change the classification in this act established, so that by such change or classification, the rates on any freight will become higher or greater than in this act fixed. When any reduction of rates or revision of classification shall be made by said board it shall be the duty of said board to cause notice thereof to be published two successive weeks in some public newspaper, published in the city of Lincoln, in this state, which notice shall state the date of the taking effect of such change of rate or classification, and said change of rate or classification so made by the said board and published in said notice, shall take effect at the time so stated in said notice.

Reduction of rates.

Classification.

"Sec. 7. That articles not enumerated in said classification in section two (2) of this act established, not rated in said schedule of rates in section three (3) of this act, shall be classed with analogous articles in said classification, and where there any conflict between said classification and said schedule of maximum rates, said rates shall govern.

"Sec. 8. That in case any common carrier subject to the provisions of this act shall do, or cause to be done, or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby, for all damages sustained in consequence of any such violation of the provisions of this act together with cost of suit and a reasonable counsel or attorney's fee, to be fixed by the court in which the same is heard on appeal or otherwise, which shall be taxed and collected as part of the costs in the case; *Provided*, That in all cases demand in writing on said common carrier shall be made for the money damages sustained before suit is brought for recovery under this section, and that no suit shall be brought until the expiration of fifteen days after such demand. Liabilities for violation.

"Sec. 9. That in case any common carrier subject to the provisions of this act, shall do, or cause to be done, or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall upon conviction thereof, be fined in any sum not less than one thousand ($1,000) dollars, nor more than five thousand ($5,000) dollars for the first offense; and for the second offense not less than five thousand ($5,000) dollars, nor more than ten thousand ($10,000) dollars; and for the third offense, not less than ten thousand ($10,000) dollars, nor more than twenty thousand ($20,000) dollars; and for every subsequent offense and conviction thereof, shall be liable to a fine of twenty-five thousand ($25,000) dollars; *Provided*, That in all cases under this act either party shall have the right of trial by jury. Penalties.

"Sec. 10. All acts and parts of acts inconsistent herewith are hereby repealed.

Approved April 12, A. D. 1893.

Bills were filed in the Circuit Court of the United States for the District of Nebraska by stockholders of certain railway

companies, to have the said law adjudged illegal and void and to enjoin the enforcement of the provisions of said law, and which cases were entitled as follows :

Oliver Ames, Oakes Ames, Frank M. Ames, William Powell Mason, E. Pierson Beebe, Charles J. Merrill, Charles F. Choate,

Complainants,

vs.

Union Pacific Railway Company, The St. Joseph and Grand Island Railroad Company, The Omaha & Republican Valley Railroad Company, The Kansas City & Omaha Railroad Company, Geo. H. Hastings, Attorney General; John C. Allen, Secretary of State; Eugene Moore, Auditor of Public Accounts; Joseph S. Bartley, State Treasurer, and A. R. Humphrey, Commissioner of Public Lands and Buildings, officers of the State of Nebraska; William A. Dilworth, J. M. Kountz and J. W. Johnson, Secretaries of Said Board.

Defendants.

} Doc. Q, No. 59.

George Smith, Charles P. Goodrich, Lawrence Minot, Thomas J. Cushing, T. Lathrop Thorndyke, Charles P. Gardner and Henry Lee, Henry L. Higginson, George C. Lee, Charles Fairchild, James Jackson and Gardner M. Lane, co-partners doing business under the firm name of Lee, Higginson & Company; Henry A. Cobb, Arthur Estabrook, Charles H. Watson, Charles E. Eddy, Arthur Sweetser and Frank L. Beemis, partners doing business under the firm name of Brewster, Cobb & Estabrook; John Parkinson, A. Tucker Burr, Joseph M. Goodale and Winthrop M. Burr, partners doing business under the firm name of Park-

inson and Burr, and Benjamin R. Weld and Francis M. Weld, executors of the last will and testament of F. M. Weld, deceased, *Complainants*,

vs.

The Chicago & Northwestern Railroad Company; Fremont, Elkhorn & Missouri Valley Railroad Company, and the Chicago, St. Paul, Minneapolis & Omaha Railway Company; Geo. H. Hastings, Attorney General; John C. Allen, Secretary of State; Eugene Moore, Auditor of Public Accounts; Joseph S. Bartley, State Treasurer; A. R. Humphrey, Commissioner of Public Lands and Buildings, constituting the Board of Transportation of the State of Nebraska, William A. Dilworth, J. M. Kountz and J. W. Johnson, Secretaries of said board, all citizens of the State of Nebraska, *Defendants.*

Doc. Q, No. 60.

Henry L. Higginson, Robert H. Gardner, Wm. C. Wells, Geo. A. Gardner, W. S. Dexter, Charles A. Cutting, F. Gordon Dexter, W. Powell Mason, E. Pierson Beebe, S. E. Peabody, and Henry Stocton, *Complainants*,

vs.

The Chicago, Burlington & Quincy Railroad Company; George H. Hastings, Attorney General; John C. Allen, Secretary of State; Eugene Moore, Auditor of Public Accounts; Joseph S. Bartley, State Treasurer, and A. R. Humphrey, Commissioner of Public Lands and Buildings, constituting the Board of Transportation of the State of Nebraska, and William A. Dilworth, J. M. Kountz and J. W. Johnson, Secretaries of the Board of Transportation of the State of Nebraska,

Defendants.

Doc. Q, No. 62.

The prayer of the bill in the Union Pacific case is as follows:

"And that by the order and injunction of your Honors the said defendants be enjoined from making or publishing a schedule of rates to be charged by said defendant company for transportation of freight on and over their roads in Nebraska from one point to another therein, whereby such rates shall be reduced to those prescribed by said House Roll 33, from those now charged by it or in any wise obeying, observing or conforming to the provisions, commands, injunctions and prohibitions of said alleged act, and that the said Board of Tranportation be in like manner enjoined from entertaining, hearing or determining any complaints to it against said company, for or on account of any act or thing by said company, its officers, agents, servants and employes done, suffered or omitted, which may be forbidden or commanded by said alleged act and from instituting or prosecuting or causing to be instituted or prosecuted, any action or proceeding civil, or criminal, against said company for any act or thing by it or its officers, agents, servants or employes done, suffered or omitted, which may be forbidden or commanded by said act, particularly for not reducing its present rates of charges for transportation of freight to those prescribed in said act; and that the said attorney general be in like manner enjoined from bringing, aiding in bringing, or causing to be brought, any proceeding by way of injunction, mandamus, civil action or indictment against said company, for or on account of any action or omission on their part commanded or forbidden by said House Roll 33, and should any county attorney threaten to bring, or should he bring any such action or proceeding, then in that case his name be inserted in this bill as defendant, and he be at once in like manner enjoined from instituting or prosecuting, or causing to be instituted or prosecuted such action or proceedings.

"And that it be by the decree of your Honors declared, that the alleged act above entitled is repugnant to the provisions of the constitution of the United States, for the reasons in that behalf hereinbefore assigned by your orators, and that the proceedings of the legislature of this state in the passage of said act, were contrary to the constitution of said state, and were ineffectual to pass or enact the said roll as a law. And that it be decreed that the injunction hereinbefore prayed be perpetual, and that your orators have their costs

of this their bill and all such other and further relief as the circumstances require, and is agreeable to equity and good conscience."

The prayer for relief in the other cases is similar to that of the Union Pacific above quoted.

Answers were filed by the State Board of Transportation and voluminous proofs were taken. Afterwards the matters came on to be heard before the court, David J. Brewer, Circuit Court Justice, and Elmer S. Dundy, District Judge, presiding. Decrees were entered in favor of the complainants in the respective cases. The decree in the Union Pacific case is as follows: (Omitting the title. p. 99.)

"This cause came on to be heard upon the pleadings, proofs and exhibits filed therein at the May term of this court before the Honorable David J. Brewer, one of the Justices of the Supreme Court of the United States, assigned to the Eighth Judicial Circuit, and Elmer S. Dundy, United States District Judge for the District of Nebraska, and was argued by counsel.

"And thereupon said judges took the matter to be considered by them, and on the.....day of November instant, the opinion of his Honor, Judge Brewer, was filed in the clerk's office, and thereupon it is ordered adjudged and decreed as follows:

"That the said railroad companies and each and every one of them, and said receivers be perpetually enjoined and restrained from making or publishing a schedule of rates to be charged by them or any, or either of them, for the transportation of freight on and over their respective roads in this state from one point to another therein, whereby such rates shall be reduced to those prescribed by the act of the legislature of this state, called in the bill filed therein, "House Roll 33" and entitled "An Act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freight upon each of the railroads in the State of Nebraska, and to provide penalties for the violation of this Act," approved April 12, 1893, and below those now charged by said companies or either of them or their receivers, or in

Enjoins publishing schedule of rates in conformity to law.

Or rates below those now charged.

Enjoins railroad from obeying the law.

anywise obeying, observing or conforming to the provision commands, injunctions and prohibitions of said alleged act; a that the Board of Transportation of said state and the membe and secretaries of said board be in like manner perpetually e joined and restrained from entertaining, hearing or determi

Board enjoined from enforcing the law.

ing any complaint to it against said railway companies, or a or either of them, or their receivers, for or on account of a act or thing by either of said companies or their receive their officers, agents, servants, or employes; done, suffered, omitted, which may be forbidden or commanded by said leged act, and from instituting or prosecuting, or causing be instituted or prosecuted, any action or proceeding, civil criminal, against either of said companies or their receivers, any act or thing done, suffered or omitted; which may forbidden or commanded by said act, and particularly from

And from reducing present rates.

ducing its present rates of charges, for transportation freight to those prescribed in said act, and that the attorn general of this state be in like manner enjoined from bringi aiding in bringing, or causing to be brought, any proceedi by way of injunction, mandamus, civil action or indictm against said companies, or either of them, or their receivers or on account of any action or omission on their part, c manded or forbidden by the said act. And that a writ of junction issue out of this court and under the seal thereof, rected to the said defendants, commanding, enjoining, and straining them as hereinbefore set forth, which injunction s be perpetual, save as hereinafter provided.

"And it is is further declared, adjudged and decreed t the act above entitled, is repugnant to the constitution of United State, for as much as by the provisions of said the said defendant railroad companies may not exact for transportation of freight from one point to another within state, charges which yield to the said companies or eithe them, reasonable compensation for such services.

Act repugnant to the constitution, as it forbids the exacting of reasonable rates.

"It is further ordered, adjudged and decreed that defendants, members of the Board of Transportation of state may hereafter when the circumstances have changed that the rates fixed in the said act shall yield to the said c panies reasonable compensation for the services afores apply to this court by supplemental bill or otherwise as t may be advised, for a further order in that behalf.

Board may, on certain contingencies, apply for further order.

"It is further ordered, adjudged and decreed that

plaintiffs recover of the said defendants their costs to be taxed by the clerk.

"The foregoing decree is entered in accordance with the opinion of Justice Brewer now on file in this case.

Nov. 23, 1894.

(Signed) ELMER S. DUNDY,
Judge."

The decrees in the other two cases were precisely the same except such modifications as were necessary to adapt the form of decree to the respective cases.

The opinion of Brewer, Circuit Justice, upon which the decrees were based is found reported in 64 Fed. Rep. p. 165. See page 2155 of Record.

REVIVOR.—Before the suing out of the present appeals the actions were revived in the names of the present appellants as the successors of the persons composing the State Board of Transportation.

(p. 2109-2125-2142.)

The State Board of Transportation so revived sued out its appeal in the respective cases to this court.

A SPECIFICATION OF THE ERRORS RELIED UPON.—The errors assigned in the Union Pacific case, upon which the appellants rely, are as follows: (p. 2115.)

1. "Said court erred in that part of the decree wherein it ordered and decreed that said railway company be perpetually enjoined and restrained from making or pulishing a schedule of rates to be charged by them for the transportation of freight on and over their respective roads in this state from one point to another therein, whereby such rates shall be reduced to those prescribed by the act of the legislature of the State of Nebraska entitled 'An Act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freight upon each of the railroads in

Enjoined R. R. from publishing schedule of rates in compliance with law.

the state of Nebraska, and to provide penalties for the violation of this act, approved April 12th, 1893.

2. "That the said court erred in that part of its decree wherein it ordered and decreed that the defendant railway companies be enjoined and restrained from reducing the rates below those now charged by said companies or either of them, or their receivers, or from in anywise obeying, observing or conforming to the provisions, commands, injunctions and prohibitions of said act of the legislature of Nebraska.

trained from reducing present rates.

3. "That the said court erred in that part of the judgment and decree wherein it decreed that the Board of Transportation of the State of Nebraska, its members and secretaries, be perpetually enjoined and restrained from entertaining, hearing or determining any complaint made to it against said railway companies for or on account of any act or thing done, suffered or omitted by said companies, their officers, agents or servants, which may be forbidden or commanded by said act of the legislature of the State of Nebraska.

rd enjoined rom enforcing he law.

4. "That said court erred in that part of its judgment and decree wherein it adjudged and decreed that the Board of Transportation for the State of Nebraska be perpetually enjoined and restrained from instituting or prosecuting or causing to be instituted or prosecuted, any action or proceeding against either of said companies for anything by them done, suffered or omitted or which may be forbidden or commanded by the said act of the legislature of the State of Nebraska.

5. "For that the said court erred in said judgment and decree wherein it ordered and decreed that the Board of Transportation be perpetually enjoined and restrained from reducing the present rates of charges for transportation of freight by the defendant railway companies to those rates prescribed in said act of the legislature of the State of Nebraska.

rom reducing present rates.

6. "That the said court erred in its said judgment and decree in that part thereof wherein it adjudged and decreed that the Attorney General of the State of Nebraska be in like manner perpetually enjoined and restrained from bringing or causing to be brought any proceeding by way of injunction, mandamus, civil action or indictment against said railway companies or either of them for or on account of any action or

ssion on their part, commanded or forbidden by the said

7. "That the said court erred in that part of its judgt and decree wherein it is adjudged and decreed that the act of the legislature of the State of Nebraska is repugto the constitution of the United States.

Act repugnant to U. S. constitution

8. "That the court erred in said judgment and decree at part thereof wherein it is adjudged and decreed that the act of the legislature of the State of Nebraska forbade the way companies from exacting for the transportation of ght from one point to another within the state charges h would yield to the companies reasonable compensation such services."

The assignments of errors in the other two cases are the e, with such slight verbal changes as are made necessary dapt the same to the titles thereof. (p. 2131-2147.)

BRIEF OF ARGUMENT.

mmary of facts found, and points decided in the opinion of the Circuit Court.

To ascertain the questions which are necessary or adble to be considered on this hearing, it will be well to state t has been decided in the opinion of Judge Brewer, Circuit ice, as found in his reported opinion. (64 Fed. Rep., 165.)

1. The court held that the law in controversy was end in compliance with the Constitution and laws of Nebraska, nown by the House and Senate Journals, and that parol evie could not be received or considered to impeach the same. 2156 to 2159.)

Law was duly enacted.

It stated conclusions upon that branch of the case as ows:

"I am, therefore, clearly of the opinion that this act ed the legislature of the state and received the approval ne governor, in due conformity to all substantial constitual requirements in respect thereto." (p. 2159.)

2. The court held the claim of the Union Pacific Railway Company, that it could not be subjected to the provisions of the statute because it was a corporation created by congress, not well taken. (p. 2159-2160.)

. P. R'y subject
state regula-
ou.

3. The court held the provisions found in the 18th section of the act, creating the Union Pacific Railway Company (12 Stat. 497) relating to rates, did not exempt the company from state control over local rates. (p. 2160.)

obnoxious to
h amendment

4. The court held the act in controversy was not invalid, nor obnoxious to the 14th amendment to the Constitution of the United States by reason of the exemption of certain roads from its operation, as provided in section 4 of said act. (p. 2160-2161.)

s not inter-
re with inter-
ate commerce

5. The court held the act in controversy did not interfere with interstate commerce. The fact that it established a classification—different from that which prevailed west of Chicago—and the fact the reduction of local rates necessitated the reduction of interstate rates, were objections to the act not well taken. (p. 2161.)

Under the appeals which have been brought to this court by the State Board of Transportation, we are freed from the consideration of a large amount of evidence in the record relating to the foregoing phases of the case, and the law touching the same.

The rulings of Brewer, Circuit Justice, adverse to the claims of appellants, may be summarized as follows:

1. The court held it had jurisdiction to grant the injunction as prayed, notwithstanding the fact that the rates were established by a direct act of the legislature, and notwithstanding the provisions of section 5 of the act, which gave any railway company which might feel itself aggrieved by the rates, the right to file its petition in the Supreme Court of the state,

and thus obtain an order on the State Board of Transportation to make an increase of those rates. Upon this point the court said:

Legal remedy provided in the act not such as to defeat the equitable jurisdiction of the Federal Courts.

"It is further insisted by the defendants that this court has no jurisdiction over these actions. First, because, in the act itself, an adequate legal remedy is provided, by petition to the Supreme Court of the state, and Courts of Equity may not interfere when adequate legal remedies are provided; secondly, because the rates are prescribed by a direct act of the legislature, and not fixed by any commission. I am unable to assent to either of these contentions." (p. 2161.)

2. The court held it was for the courts to decide what should constitute reasonable maximum rates, notwithstanding the provisions of the Nebraska Constitution upon that subject, and said: (p. 2166.)

"The power which the legislature has is only to prescribe reasonable rates, not any rates. The language of the Constitution of Nebraska in respect to the matter is (Constitution, 1875, art. 11, § 4): 'And the Legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state.' But the foundation of the idea of reasonableness is justice. That which is unjust cannot be reasonable, and, when the strong arm of the legislature is laid upon property invested in railroad transportation, it must be so laid as to do justice to such investors."

Legislature to decide what are reasonable rates.

3. The court held that in determining what would constitute reasonable rates, it was proper to inquire into the value of railroad property, and in doing so the amount of stock and bonds were items not to be ignored, even though the same were much in excess of the present value of railroad property.

Upon that point the court said: (p. 2167.)

"If it be said that the rates must be such as to secure to the owners a reasonable per cent on the money invested, it will be remembered that many things have happened to make the investment far in excess of the actual value of the property—injudicious contracts, poor engineering, unusually high cost of

material rascality on the part of those engaged in the construction or management of the property.

* * * * * * *

"Now, if the public was seeking to take title to the railroad by condemnation, the present value of the property, and not the cost, is that which it would have to pay.

* * * * * * *

"It is not easy to always determine the value of railroad property, and if there is no other testimony in respect thereto than the amount of stock and bonds outstanding, or the construction account, it may be fairly assumed that one or other of these represents it, and computation as to the compensatory quality of rates may be based upon such amounts. In the cases before us, however, there is abundant testimony that the cost of reproducing these roads is less than the amount of the stock and bond account, or the cost of construction, and that the present value of the property is not accurately represented by either the stock and bonds, or the original construction account. Nevertheless the amount of money that has gone into the railroad property—the actual investment, as expressed, theoretically, at least, by the amount of stock and bonds—is not to be ignored, even though such sum is far in excess of the present value."

k and bonds be considered in determining value of R. property.

4. The court held that in determining the reasonableness of the rates set down in the law, we must first ascertain the cost of carrying local freight; second, the receipts from local freight; third, the reduction in receipts, the enforcement of the law would impose; and fourth, whether there would be left any profit on the purely local business affected by the act, *i. e.*, whether any profit would result from purely local freight business, excluding all other considerations. The court said: (p. 2169.)

determine sonable rates local freight.

"We have an attempt by the legislature to prescribe a maximum tariff for only the transportation of freight within the limits of Nebraska, and are called upon to determine whether the rates so fixed are reasonable, and afford no fair compensation to those who have invested their means in these railroad properties. In order to determine this we must as-

ain what it costs to carry this local freight, what the re-
ots have been therefrom, and what reduction will be made
such receipts by the application of this act, and then we
st take such proportion of the gross investment in the roads
the present earning from local freights bear to the total
nings of the road. From these computations we may see
ether the reduction made by this act in the local freights,
pplied to all the company's business, would leave any com-
sation to the owners, and if so, how much."

5. The court found by the foregoing manner of computa-
n that by the enforcement of the law the profits on the local
ght business would be: (p. 2173.)

ion Pacific Railway	$55,596	Profits.
rlington & Missouri Railroad in Nebraska	77,617	
icago, St. Paul, Minneapolis & Omaha	5,587	

The deficits would be:

emont, Elkhorn & Missouri Valley	$ 696	Deficits.
aha & Republican Valley	19,965	
Joseph & Grand Island	846	
nsas City & Omaha	244	

That is to say, that the main lines would have earned a
ofit but the feeders would not.

6. In determining whether this profit was sufficient, the
rt apportioned the bonded indebtedness (real and fictitious) Profit not enough to pay interest on real and fictitious bonded debt.
the entire mileage upon the mileage in Nebraska, and found
resulting net profit insufficient to pay interest on this
nded debt.

7. The court held that in determining the reasonableness
the reduction of rates fixed by the law, we must exclude from
nsideration the profits from interstate business, the profits
om passenger business, the profits from local business in Excludes all other profits.
ner states, but should consider what would be the effect on
e gross income of the companies if a reduction should be
de to a like rate in other states and by congress on inter-

state business, so as to affect in a similar degree the whole business of the companies.

The questions which are now here for consideration on these appeals are mainly as follows:

A. The right of the Legislature to determine what shall constitute or be reasonable maximum freight rates.

Questions for consideration.

B. Whether the maximum rates fixed by the Nebraska law are reasonable maximum rates, or whether such rates are so low as to justify a court of equity in adjudging them to be unreasonable, and to enjoin the enforcement of the law.

C. The determination and consideration of the various conditions and elements which are to be taken into account in deciding whether the rates so established are reasonable or unreasonable.

Division C may be further subdivided as follows:

What may be considered—

1. Whether we are to exclude from consideration, in determining whether rates are reasonable or unreasonable, the general earnings of a railway company.

1. General earnings.

2. Passenger business.

2. Whether we are to confine inquiry to profits derived from local freight traffic alone, excluding all consideration of interstate business or of passenger business.

3. Whether the reasonableness of a rate is to be determined by the simple net profit, if any, derived from local freight business, *i. e.*, that a rate may be held to be unreasonable if it does not allow a profit over and above the cost of transportation of an article.

3 Not confined to cost of Transportation.

4. Whether we may not take into account the fact that some of the roads are built simply as feeders to main lines, and are known to enter unprofitable territory so far as local business is concerned, but are sources of great revenue to the companies on account of general business which they bring to the main lines.

4 Auxiliary lines.

5. Whether, in determining what shall constitute the charges which are to be deducted from the gross profits, we are to include or exclude the interest upon fictitious capitalization, and many other kindred questions which will arise as we proceed with the discussion of the case.

5 Fictitious Capitalization.

It may be proper to add that the gist of the conclusions of the Circuit Court, was to the effect that in determining the reasonable or unreasonableness of the rates fixed by the Nebraska law, there can only be taken into account the earnings from local freight business, and that if the enforcement of the law would not leave to the companies a net profit over and above the cost of such transportation, then the rates must be adjudged to be unreasonably low, and the law held to be invalid, and that the court should exclude from its consideration all other sources of revenue or profit, as well as all other conditions and relations.

If we are to accept the above propositions to be true as a matter of law, we still mean to contend that the Circuit Court fell into grave error in the basis of its computation.

Section 4, Article 11, Constitution of 1875, provides:

"And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different roads in the state."

Nebraska Constitution.

We do not stop at this point to either affirm or deny the power of the legislature to determine what shall be a reasonable rate, but shall direct our attention to the proofs adduced in the case to show that the rates established are reasonable in fact.

Several Hundred Millions of Money Paid for Freight Rates Annually.

Statistics show that in 1890 the number of tons of freight carried was 636,541,617. For the carrying of this freight the

railways charged annually in round numbers $736,793,699.00. This is an enormous tribute paid by the people of this country to transport the product of the land from the producer to the consumer. The enormity of this sum of money is so great that it is difficult to comprehend it.

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The amount of outstanding stock of the railways in the United States on June 30th, 1890, was $4,409,658,485.00. The amount of funded debt was $4,574,576,131.00. It will thus be observed that the amount received by railways for the transportation of freight was a sum nearly equal to one-sixth of all the capital stock of the railway companies, and nearly equal to one-sixth of all the funded debt of the railway companies. In considering this statement it must not be overlooked that many railway companies are bonded and stocked for much more than their actual value. The chief railway companies involved in this litigation are capitalized at 3 and 4 times their actual value.

The fact that so much money should be taken from the people to pay for the transportation of freight is appalling. When we recall the fact that these systems of railways have been constructed under authority granted by the people, and for the use, benefit and accommodation of the people and assisted by municipal, state and national subsidies, it is self-evident that the regulation of freight rates by the people has become a proper subject matter of inquiry and legislation.

Amount Paid for Tonnage Hauled in Nebraska.

The total amount received by the railway companies in Nebraska for freight carried within the limits of the state in the year 1893 was $14,460,669.00 (see p. 980), excluding the amount received for carrying freight by the Chicago, Rock Island & Pacific, the Sioux City, O'Neill & Western, Missouri Pacific, Sioux City & Pacific, Kansas City & Beatrice, and

Kearney & Black Hills. If these lines were included in the computation the amount paid for freight hauled within the limits of Nebraska in 1893 would aggregate about the sum of $20,000,000.00, or about $20.00 for every man, woman and child in the State of Nebraska, or $100.00 for every elector in the state.

$20 for each inhabitant, $100 for each elector.

But this is not all that Nebraska pays.

The grain producers of Nebraska ship their product to Chicago and the Atlantic seaboard. The people of Nebraska buy what they consume from the merchants, and the merchants receive the goods they handle from the eastern manufacturers; so that the producers and consumers of Nebraska are made to bear their shares of freight transportation over all the railroads that pass through all the states from the Atlantic seaboard to Nebraska.

The result is that the twenty millions above mentioned, constitutes but a small percentage of the whole amount of freight tariffs which our people either directly or indirectly pay.

The Revenues from Freight Rates Over and above the Cost of Transportation, Are Greater in Nebraska and in Surrounding States, than in any Other Portion of the American Union.

The Interstate Commerce Commission in its volume of statistics of railways in the United States for 1890, p. 72, has a table showing the revenue per ton for freight per mile, and the average cost of hauling one ton one mile. Classified by groups of which the following is an extract:

TERRITORY COVERED.	Revenue per ton of freight per mile.	Average cost of carrying one ton one mile.
	CENTS.	CENTS.
Group I	1.373	.949
Group II	.828	.524
Group III	.695	.470
Group IV	.844	.571
Group V	1.061	.705
Group VI	.961	.593
Group VII	1.360	.713
Group VIII	1.152	.719
Group IX	1.303	.961
Group X	1.651	1.034
United States	.941	.604

Profits over cost of carrying.

An examination of the above table will show that in Group I the revenue is 45 per cent over cost of carrying.

In Group III, 45 per cent.

Group IX, 33 per cent.

Group X, 60 per cent.

Group VII, 90 per cent.

It will further show that the per cent. of profit is greater in Group VII than in any of the other ten groups. Nebraska is in Group VII.

Profits unduly greater in Nebraska than elsewhere.

We will show, at a later point in the argument, that the local freight rates in the state of Nebraska are much higher than they are in the surrounding states.

The rates charged in Nebraska are a higher percentage on the value of the article shipped than elsewhere—hence our people are compelled to pay an unjust proportion—an exorbitant rate.

The logic of the situation is that Nebraska contributes an undue proportion to the railway profits, or, in other words, it

is less favored by the railroads than are any of its neighboring states. There is no justification for this.

This was the existing condition which confronted the legistors as one of the inducements for the enactment of the Nebraska Maximum Freight Rate Law.

Amount of Reduction on Local Freight Rates in Nebraska by the Maximum Freight Law.

Mr. W. A. Dilworth, for the complainant, testified the amount of reduction on local rates within the state of Nebraska by the act of 1893 would average twenty-nine and a half per cent. (pp. 395, 396.) He further stated that the rates fixed by this act are "higher than the rates fixed by the laws of the state of Iowa, but just how much higher he did not remember." He further stated, as shown by Exhibit 19 (p. 977), that the percentage of reduction on the total amount of business done by the respective railway companies in Nebraska would be as follows:

Reduction 29½ per cent.

B. & M. R. R. R.	4.2 per cent
C., St. P., M. & O.	4.5 per cent
F., E. & M. V.	4.1 per cent
U. P. Ry.	2.0 per cent
O. & R. V.	1.9 per cent
St. J. & G. I.	2.7 per cent
K. C. & O.	1.5 per cent

On total business 2½ per cent.

The above would be an average of 2½ per cent. upon the business of the roads within the State of Nebraska.

Local Rates in Nebraska Are 40 Per Cent. Higher Than in Surrounding States.

For the time being let us have in mind, however, the fact that the present local rates within the State of Nebraska are more than one-fourth higher than the rates established in the

raska local
es 40 per cent
her than in
nnesota, Wis-
n-in, Dakota
d Kansas.

Maximum Freight Law. Put in another form, the statement is this: Where the present local rate as charged by the railroads in Nebraska would be $1.00, the same would be reduced by the Maximum Freight Law to 70½ cents. It will thus be seen that the present local rates exacted by the railway companies in Nebraska are a fraction more than 40 per cent. higher than the rates fixed in the Maximum Freight Law.

If we turn our attention to Exhibit "B," pp. 29, 265 attached to the respective bills of complaint, we there find a tabulated statement of the rates charged in the respective states of Wisconsin, Minnesota, Dakota and Kansas, put in comparison with the rates established by the Nebraska Maximum Freight Law. A casual study of that table will show that the rates established by the Maximum Freight Law of Nebraska are on an average about the same as those fixed in the other states named. In some instances rates are less, but in other instances the rates are higher. For the purposes of comparison we will use the words "Newberry Rates," as representing the rates fixed by the Nebraska Maximum Freight Law, as it is so used in that table. Let us take a few illustrations:

trations and
mparisons.

The rate for Class 1, five-mile haul—the Newberry rate is 13 cents, which is 4 cents higher than in Wisconsin and 1 cent higher than in Minnesota and Dakota, and the same as that of Kansas. On Class 2 the Newberry rate is 3 cents higher than Wisconsin and 1 cent higher than Minnesota and Dakota. On Class 3 the Newberry rate is 2 cents higher than Wisconsin and 1 cent higher than Minnesota and Dakota, and the same as that of Kansas.

at.

Passing further out on the column to rates on wheat, grain, lumber and cattle, which are the chief articles of local transportation within the State of Nebraska, as testified to by Mr. Dilworth for complainants, (p. 637), we find for the five mile haul the Newberry rates on wheat are 4 cents, which is ½ cent higher than Wisconsin or Minnesota, and 1 cent lower

than in Kansas. On other grains the Newberry rate is 4 cents, while in Wisconsin and Minnesota the rate is 3½ cents, and the rate in Kansas 4 cents.

On lumber, the rates in Nebraska are 4 cents, which is 1 cent higher than Wisconsin and Minnesota, and equal to the rate in Dakota and in Kansas. On cattle, the Newberry rate is 9¾, while in Wisconsin and Minnesota the rate on cattle is 3 cents, Dakota, 5 cents, Kansas 9 cents. Lumber. Cattle.

From the comparisons above made, we observe that the Newberry rates are higher than the rates in the other states named, in almost all instances, except Kansas.

Now let us take a few illustrations from the 150 mile haul. On classes 1, 2 and 3 the Newberry rates are little lower than in the other states, but when you come to horses and mules the Newberry rates are 30 cents, which is 10¾ cents higher than the rates in Wisconsin and Minnesota, and 9-10 higher than in Dakota. On cattle the Newberry rates are 25½ cents, which is 8 cents higher than Wisconsin or Minnesota, and 6½ cents higher than Dakota.

A vast number of other illustrations might be cited to illustrate the same facts, which are that the Newberry rates in many instances on merchandise, are less than the rates in the other states named, and in almost every instance the Newberry rates on grain, lumber and cattle are higher than the rates fixed in the other states. From a comparison of the entire table, we think it fair to say that the Newberry rates compare very favorably with the rates named in the other states. Nebraska Maximum rates as high as rates in sister states.

Now keep in mind the admitted fact that the Newberry rates are higher than the rates in Iowa.

Now recall for a moment what we demonstrated a little while since, that the present local rates in Nebraska are 40 per cent. higher than the Newberry rates; *hence we are brought face to face with the proposition, that the present local rates*

Present rates 40 per cent higher than in other states.

in Nebraska are about 40 per cent. higher, on an average, tha the rates in Wisconsin, Minnesota, Dakota and Kansas. Doe it not strike the shippers, at first blush, that there is no goo reason why the railway companies should exact from th people of Nebraska a rate for transportation of freight locall 40 per cent. higher than the rates charged by the same railwa companies for the transportation of local freight in other state named? Upon the mere face of the statement, it must strik the casual observer that there is something wrong and exorbi tant in the rates exacted by the railway companies for loca traffic in Nebraska.

The defendant railway companies penetrate all th states named.

The Chicago, Burlington & Quincy road has its lines ex tending from Chicago through Illinois, Minnesota, Dakota Iowa, Nebraska and Kansas. The same is true of the Chicag & Northwestern system. The Union Pacific permeates Kansas Nebraska, Dakota and other points west.

If you come to look at the separate companies, whic form parts of these great railway systems, you find that th Fremont, Elkhorn & Missouri Valley starts out from Omah through Nebraska and reaches into Dakota. The St. Paul Minneapolis & Omaha, starting out from Omaha, Nebraska reaches into Iowa, Wisconsin and Minnesota. The Burlington & Missouri River extends out from Omaha through Nebrask into Dakota, Wyoming, Colorado and Kansas.

Why should R. R. insist in charging 29½ per cent more in Nebraska than in sister states.

Under the local rates as established in the state of Wis consin, Minnesota, Dakota, Kansas and Iowa, these respectiv railway companies carry local freight at a rate which is abou 29½ per cent. lower on an average than the rates in Nebraska or stating the converse of the proposition, these respectiv roads, charge the people of Nebraska a rate, for local freight

about 40 per cent. higher than the same rates charged the people for like local shipments in the surrounding states.

IF THE RATES CHARGED IN THE SURROUNDING STATES ARE REASONABLE IN FACT, OR ACCEPTED BY THE RAILWAY COMPANIES AS REASONABLE IN FACT, THE LOGIC OF THE SITUATION IS THAT THE LOCAL RATES EXACTED IN NEBRASKA ARE HIGHLY UNREASONABLE AND EXORBITANT. There is no good reason why the shippers in the State of Nebraska should pay a rate 40 per cent. higher than the same roads exact from the people in the neighboring states. What is there in a state line over which a railroad crosses, that can justify, or excuse it for exacting from the people of Nebraska this exhorbitant rate, when put in comparison with the surrounding states? This was a condition that confronted the people of the State of Nebraska, when through its legislative assembly, it undertook to investigate this question, and to declare by law what should be considered as the maximum reasonable rates to be charged for local freight in Nebraska. If we rest the fact upon the comparisons above named, the proofs would seem irresistable, that the rates established by the Newberry bill are reasonable rates.

No good reason for it.

It is no answer for the railway companies to suggest that the total revenue of these lines of railway are insufficient. For the purposes of the argument suppose we grant that the entire revenues of these railway companies are insufficient; the proposition still remains, that there is no just excuse for the exorbitant tax upon the people of the state of Nebraska, to pay for a deficiency upon those parts of the lines extending into the states of Iowa, Wisconsin, Minnesota, Dakota and Kansas. There is no reason why the Nebraska shipper of cattle should be charged a big price, to make up for the deficiency arising from a shipment of cattle for a resident of Minnesota, or of Iowa. There is no reason why the producer of grain in the state of Nebraska should be charged an exorbitant rate to

Nebraska should not pay for deficit in other states.

make up for any deficiency arising from the shipment of grain by the grain producer in Minnesota or Dakota.

WHAT ARE REASONABLE RATES IN THE OPINION OF RAILROAD MEN?

1. The Railroad Men Say that Tariff Rates are Reasonable that Absorb All the Margin the Articles Transported Will Bear, Without any Reference to the Cost of Transportation.

"A reasonable rate is one which will make just and fair return to the carrier, when charged to all who are to pay it, without unjust discrimination against any, and when the revenue it produces is subject to no improper reductions."

See report Inter-state Commission, 1890, p. 30.

Railway people do not fix rates on cost of carrying.

The testimony adduced in behalf of the complainants, in the case at bar, exhibits a system of establishing freight rates which absolutely ignores the principles above stated. According to the testimony of the witnesses called in the interest of the railway companies, the question of the cost of transportation is an item never taken into account, except from one point of view, which is that the tariff rates shall always exceed the cost of hauling the article. It further appears from that testimony, that the average freight agent of the railway companies knows no more about the cost of carrying freight *than the man in the moon.*

Albert Fink, an expert witness, had been engaged in the transportation business with railroads since 1865 (pp. 640-641.)

Mr. Fink testifies: (p. 652.)

"You ask me the question how tariffs are framed, and I merely mentioned that cost was an element to the extent that you ought not to take any business at less than cost; but beyond that the cost has very little to do with the framing of

's. In fact, as a matter of practice, it is hardly ever con-
ed. A general manager may have in his mind a certain
mum cost under which he does not want to take freight,
he *freight agents do not know any more about the cost than*
an in the moon. They make their tariffs on commercial
ciples. They find out what they can get, and they adopt
ariff with a view of securing business. * * * They
imply guided by competition with other roads and water
and the competition in the market. That forms the
cipal basis in making tariffs. The cost of transportation
rdly ever considered."

Conflicts with the theory of court.

Railroad Tariff Rates are Made up on the Basis of Charging All the Article Will Bear, and not on the Basis of Charging Reasonable Compensation for the Hauling.

This was made to appear from the whole examination of Fink. It was also made to appear from the testimony of E. Utt, who was the second expert examined by the com-
ants. He had been connected with the practical operation
e freight departments of railroads from 1871 to 1886, a
d of fifteen years.

He testified: (p. 422.)

"Well, when railroads are built through a territory where
are no competing roads that regulate their rates, they
come into competition with teams. That was so on the
son & Nebraska. We made rates to Tecumseh and sta-
between Rulo and Lincoln as against teaming to the Mis-
river. After we reached Lincoln we made the rates
in competition with the B. & M. In the case of the
n Pacific from here west, they made rates as against the
n trains which had been for years hauling the freight
Kearney and points west. They considered that time
dispatch was quite an important factor in their favor, and
considered the volume of business and what they consid-
vas remunerative to them, based on the amount of freight
would haul and what earnings they would secure in order
ke a showing for the road. In this way their rates were

R. R. charge all the article will bear.

made to Salt Lake, and there they connected with the Central Pacific, and on the through business from the Pacific coast to the east they made rates in competition with the steamship lines."

On cross-examination Mr. Utt stated, in effect, these rates so established by the railway companies mentioned on a basis of coming in competition with other means of transportation, even though that means of transportation should be by an ox train, were reasonable rates: (p. 516).

Given to competition with ox teams.

"Q. You then proceeded to fix a rate by which it could be carried cheaper than it could be carried by teams?

"A. Yes, sir.

"Q. Such rates you then in your judgment considered reasonable under the circumstances and conditions then existing?

"A. Yes, sir."

In further proof that the railway companies, in determining what are reasonable rates, did not take into consideration the cost to the company of the traffic but constructed a tariff charge as high as the article would bear, or as the company can charge, on account of competition with other means of transportation, Mr. Utt testified: (p. 518.)

Competition the limit of freight rates.

Q. I ask you whether or not, in your opinion the rates fixed by the railway companies since the growth of competition, such rates being much lower than they were years ago, whether or not such rates when so established by the railway companies are not within the ordinary signification of the word reasonable rates?

"A. In a general sense they are."

Freight rates are frequently so arranged as to regulate the prices of merchandise. In such cases the rates are so arranged by the companies to absorb all there is in the particular line of business, except a small margin to the merchant or the dealer. Upon this point Mr. Utt testified: (p. 435.)

"Q. And prices of merchandise differ as furnished from

obbing points, largely on account of difference in rates, do hey not?

"A. *The freight in and out makes the dealers' prices, llowing them a small margin of profit for conducting the usiness.* If the freight is so high as to wipe out the margin, e abandons the trade and complains of a discrimination of ates as a reason for it."

Railroads regulate dealers' prices.

When we read the foregoing statement of this railway xpert, the merchant may well stop to thank the railway com-any for allowing him a small margin of profit for conducting is business, as Mr. Utt confesses the railway companies allow im this single consolation. If this be the system on which reight rates have been established in Nebraska, and Mr. Utt tates that it is, the railway companies are in the attitude of under-aking to regulate every man's business, in which enters railway ransportation. This makes the railway companies the mas-ers of the people. It subjects the business and prosperity of he people to the fancies or dictation of the traffic managers. his is reversing the economic condition which induced the tate governments to grant these extensive franchises to rail-ay corporations.

And business.

This line of thought is further amplified in the report of he United States Pacific Railway Commission, as a result of s investigations, and the manner in which the Union Pacific ailway company, and the other Pacific roads, established ates; controlled business, and interfered with the lawful pur-uits of the people. Mr. Pattison, the chairman of that com-ittee, in his report says: (p. 1168.)

"*They increased the cost of living.* They laid propri-tary claim to the traffic of large sections of the country. hey squandered millions of their money to protect their ter-itorial claims, while spending other millions in encroachments pon the territory claimed by other companies. They consti-uted themselves the *arbiters of trade.* They attempted to ictate the channels that trade should follow, and fixed rates f transportation that were extortionate. *They charged all*

Pattison report on how they regulated all business on line of road.

that the traffic would bear, and appropriated a share of the profits of every industry, by charging the greater part of the difference between the actual cost of production, and the cost of the article in the market. They discriminated between individuals, between localities and between articles. They favored particular individuals and companies. They destroyed possible competitors, and they built up particular localities to the injury of other localities, until matters had reached such a pass that *no man dared engage in any business* in which transportation largely entered without first soliciting and obtaining the permission of the railroad manager. They departed from their legitimate spheres as common carriers and engaged in mining articles for transportation over their own lines. *They exerted a terrorism over merchants and over communities*, thus interfering with the lawful pursuits of the people. They participated in election contests. By secret acts and violent and rapid fluctuations in rates, they menaced business, paralyzed capital, and retarded investment and development."

In view of what is disclosed in this record, what we have heretofore quoted being but a sample, does it not strike the court that the people of Nebraska have been patient and long suffering? It cannot be reasonably stated that they have acted with undue haste in undertaking to fix and regulate freight rates. For thirty years they have patiently borne and groaned under these unjust burdens.

Nebraska long suffering.

It is too much to hope that we shall be able to convince the railway companies of the wrongs they have inflicted upon this people, or that the rates which the people have fixed through their legislative assembly, are just or reasonable. We do not, therefore, appeal to the railway companies in this matter but to the people and to the courts.

"A company with $100,000,000 of water in its capital will not take the same view of a reasonable rate that would be taken, by a company conducted upon sound business principles. The pool puts the merchant at the mercy of an arbitrary rate, determined by a railroad manager, who disregards cost of service in his adjustment and who fixes rates between localities, individuals and industries, under varying

conditions. Such a system must produce glaring inequalities, gross favoritism, and opportunities for corruption." *Pattison's Report.* (p. 188.)

We invite special attention to what we have said as showing that railroad transportation is now conducted as a purely speculative business, and without much regard to the principle that the "transportation of persons and property is, equally with carrying of letters and papers, a legitimate function of government," and without much regard to what shall constitute a reasonable rate as defined by the report of the Interstate Commission, *supra.*

Nebraska Rates are Shown to be Exorbitant and Unreasonable by Comparing Them With Rates from Missouri River to Chicago.

Mr. Utt on his cross-examination states: (p. 478-479.)

"Q. The Burlington & Missouri on a shipment from Omaha to Lincoln, received how much of the whole tariff from Chicago to Lincoln?

"A. The business went through Plattsmouth, and on the through business the rate was five cents higher than the Missouri river rate, and the Burlington & Missouri got forty five per cent. out of 100 of the through rate.

"Q. It was how far from the Missouri river to Lincoln?

"A. I think it is sixty-one miles.

"Q. How far from the Missouri river to Chicago?

"A. About 485 miles.

"Q. So then, on an amount of shipment which would be worth $100 freight charges from Chicago to Lincoln, the line from Chicago to the Missouri river being 485 miles, would receive $55 and from the Missouri river to Lincoln, sixty-one miles, would receive $45? 61 miles $45, 455 miles $55.

"A. Yes, sir.

"Q. Now, that is the way you understand the through rate was established?

"A. That is the way it was divided.

"Q. Now, the territory from the Missouri river to Chicago was through a comparatively level country?

"A. From Chicago to the Missouri river, yes, sir.

"Q. And from the Missouri river to Lincoln likewise through a comparatively level country?

"A. Yes, sir.

Operated by same company under similar conditions.

"Q. And both of these branches or lines are operated by the same company, are they not?

"A. The same owners, but the earnings are kept separate.

"Q. It is all owned by the Chicago, Burlington & Quincy Railroad company, is it not?

"A. Yes, I believe it is.

"Q. That is a matter of common knowledge, is it not?

"A. Yes, sir."

If a railway company can haul freight from Chicago to the Missouri river, 485 miles, for $55, it is certainly an exorbitant rate to charge $45 for hauling the same freight the short distance of fifty-five miles, from the Missouri river to Lincoln, or from Omaha to Lincoln. The rate from Chicago to the Missouri river must be treated as a reasonable rate, as it is a voluntary rate long in use, and not complained of in the record. The rate in Nebraska west from the Missouri river must therefore be exorbitant.

DISCRIMINATION IN FREIGHT RATES.

The Railroads in Nebraska Have Heretofore so Arranged Their Tarriff Rates as to Discriminate in Favor of Certain Localities, and against Other Localities, and in Favor of Certain Articles and Against Other Classes of Articles.

One of the chief objects sought to be attained by the

Maximum Freight Law was the preventing of unjust discrimination.

The establishment of a reasonable rate looks as much to the bringing about of uniformity by the abolishing of unjust discriminations as the reduction of rates as a whole.

The acts seeks to do justice between all classes of shippers.

Utt's Confession.

Mr. J. E. Utt, the complainant's expert witness, and the present commissioner of the Commercial Club of Omaha, confessed that the object of his present employment was to prevent discrimination by the railway companies against Omaha in the matter of railway transportation.

Mr. Utt testified, p. 410:

"Q. What is the object which the club and which you have in this matter?

"A. Well, we wish to arrange freight rates so that there shall be no discrimination against the business interests of Omaha in favor of some other competing points."

This is a lamentable confession, that merchants are obliged to form clubs, and to employ a commissioner to prevent the railroad companies from committing unwarranted discriminations.

Again John E. Utt says, p. 411:

The high local rates in Neb. added in Interstate shipments.

"Well, rates in Nebraska, for example, are mostly made from points outside the state, by adding the rate to the Missouri river to the local rate in the state, from the Missouri river, to form a through rate. This is true from Chicago, St. Louis and Mississippi river points in Nebraska west of Lincoln. There are reasons why it is not so at Lincoln and points between the Missouri river and Lincoln, Fremont and Beatrice."

COMMENT.—Here is a decided discrimination against all Nebraska points. The local rates now in force in Nebraska, which are added to all shipments coming into the state, are abont 40 per cent. higher than the local rates in Kansas, Minnesota and Dakota; hence, even in interstate shipments, the

Nebraska consignee pays this higher rate than do consignees in these other states. To equalize rates the local rates in Nebraska must be reduced as provided in the Maximum Freight Rate Law, so as to conform as much as may be to the local rates in these other states, through which the roads extend that are parties to these suits.

A discrimination that can only be stopped by reduction of local rates.

THE DIFFERENTIALS.

Another illustration of discrimination is in the rates known as differentials.

All points in eastern Nebraska, such as Blair, Fremont, Lincoln and Beatrice, have the benefit of all through rates from the east to Omaha or to the Missouri river, with a small additional rate to these points named, as to practically place these cities on the Missouri river, so far as rates are concerned But all shipments that go to points in Nebraska beyond the cities named pay the full local rates from the Missouri river. This is a discrimination in favor of Fremont, Blair, Lincoln and Beatrice, over all the rest of the state. (p. 89-90.)

Mr. Utt further states that the object of these differentials was to put Lincoln and Omaha on the same footing (p. 92), althou h the haul from Chicago to Lincoln is fifty miles further tha to Omaha. The evident result of this system of differentials is to discriminate in favor of Lincoln as against Omaha in the first instance, and second, to discriminate in favor of Lincoln as against all points in the state west of Lincoln.

As Lincoln is fifty miles nearer all western points in Nebraska than Omaha, the Lincoln merchants can consign to western points at a total rate less than can Omaha merchants.

Again the result of these differentials is to build up these eastern towns in this state, to the detriment of western towns; or rather it is a discrimination in favor of these cities, against

the farmers and villagers of the state. It is favoritism to these cities against the great body of the people, who in the eye of the law are entitled to equal privileges from these common carriers.

It is also self-evident that if the railroads can haul freight from the Missouri river, fifty-five miles, to Lincoln at this *low rate, called differential, at a profit*, they can also, *with equal profit* haul the same freight over an *equal distance west from Lincoln* at the same low rate, and so on to all points west throughout the state at the *same ratio of rate*. It is admitted that this *differential rate* is much *lower* than the local rates established in the law in question.

In profit in differential why not in same rate west of Lincoln.

Dilworth on the Effect of Differentials:

Dilworth states (p. 695): "The rates on freight from eastern points to points in Nebraska are made up by taking the through rates from eastern points to the Missouri river, and from the Missouri river west to points in Nebraska, the local rate in Nebraska is added."

This principle applies to all consignments to points in Nebraska lying west of a line drawn north and south through the city of Lincoln. (p. 695).

"Lincoln has what they term a differential rate that virtually places it and all intermediate points, that is points between it and the Missouri river, on the Missouri river, so far as a distributing point is concerned. For instance, on first class freight, they only pay five cents a hundred more from Chicago than the Missouri river points do, and they have a corresponding decrease on the rates out to points in the state."

"Q. Explain what you mean by differential rates?

"A. That is a rate, as I understand it, that is put in to equalize the differences between distributing points, that is, these differential rates put Lincoln on the same footing as Omaha, taking into consideration the rates out of Lincoln, and

Dilworth on differential rates.

it is a rate that is arbitrarily made between points, without any other consideration than the discretion of the railroads.

"Q. Then is it, or is it not, measured by the length of the haul, or is it made according to any arbitrary action of the railroad management?

"A. It is not measured by the length of the haul, the only thing that is considered is simply the action of the railroads in putting it in themselves.

Are less than local rates in other parts of state.

"Q. Then another question is that the differential rate by which the goods you have spoken of are delivered at Lincoln, at the rate named by you, less than the local rates for hauling freight the same number of miles through other territory within the state of Nebraska?

"A. Yes, sir.

"Q. About how much less is it; by that I mean the percentage or ratio?

As 5 to 19, or only ¼ of local rates for like distance.

"A. I believe it is one-fourth; that would be my idea of it now. I think the rate on first-class for fifty miles is about nineteen cents, fourteen to nineteen, and this other is only five cents.

"Q. By that you mean if the same railroad hauled that freight a distance of fifty miles over some other territory in the State of Nebraska it would charge nineteen cents, whereas, under this differential it charges from the Missouri river to Lincoln but five cents.

"A. Yes, sir; if I am not mistaken in the figures, and I think it is nineteen cents.

And less than rate fixed by the new law.

"Q. Is that differential rate charged on this class of freight from the Missouri river to Lincoln less than the rate which would be charged if the railroads complied with the present law, to wit: the Newberry bill?

"A. Yes, sir; it is less than the Newberry bill; considerably so.

"Q. Can you tell about how much it is less than the rates as fixed by the Newberry bill?

"A. I believe it is about the same; I think on the short distances the Newberry bill and the old law read about the same; for the first fifty miles there is not a great deal of difference between them.

"Q. What I want is how much this differential rate of five cents per hundred from the Missouri river to Lincoln is

less than the rate which woud be fixed by the Newberry bill for transporting the same freight over the same distance of mileage?

"A. I think it is only one-third.

"Q. One-third as much as the Newberry bill.

"A. Yes, sir.

"Q. *In other words if the railroads complied with the Newberry bill they would charge on this freight from the Missouri river to Lincoln about three times as much as the rate which the railroads themselves have in force?*

New law would allow nearly 3 times the differential rate.

"A. *Yes, sir.*

"Q. How long has this differential rate you have spoken of been in existence?

Differential, a long standing voluntary rate.

"A. Since 1887 or 1888, I think; it has been in existence ever since I have been on the board.

"Q. Now you may state, then, Mr. Dilworth, whether or no the use of that differential rate has or has not been an advantage to the people living in Lincoln over and above any advantages given by the railroad people to other points of the State of Nebraska where the mileage hauled was a like distance?

"A. Most assuredly.

"Q. Then, as I understood it, you mean by that, that this differential rate has merely been an advantage which the railroad companies have given to Lincoln as against other agricultural regions of the state?

"A. The effect of that is to place Lincoln, so far as freight is concerned, on the Missouri river banks.

"Q. That practically gives them an advantage of fifty-five miles of haul without paying for it, does it not?

"A. Yes, sir."

The Maximum Rates Fixed by Law are Higher than these Differential Rates now Granted by the Railroad Companies.

This differential rate from the Missouri river to Lincoln is only one-third as high as the rates fixed by the Newberry bill (p. 698).

In other words, if the railroads charged for that fifty-five

miles haul, the local rates allowed by the Newberry bill, th rate from the Missouri river to Lincoln would be three time as great as the present differential rate.

The railroad companies will scarcely be heard to say tha they are hauling this merchandise over a distance of fifty-fiv miles at a loss to themselves. They do not make any such claim.

It necessarily follows from this that if the railway com panies are permitted to charge three times more than th differential rate as they would be permitted to charge under the Newberry bill, that the local rates fixed by the Newberry bill are not unreasonably low.

hy enjoin a rate 3 times as high as this differential.

The present local rates being forty per cent higher than the rate fixed in the Newberry bill, it follows that the present local rates on a fifty-five mile haul west of Lincoln are more than four times as great as the differential rate from the Missouri river to Lincoln. The present local rate to all points in Nebraska west of Lincoln is added to the rate from all eastern points to the Missouri river, in order to make the through rate to the point of destination.

The result is that all consignors to points in Nebraska west of Lincoln pay an enormously high rate when put in comparison with the present rate to Lincoln.

te west of Lincoln enormously high.

This result is discrimination against all other points in the state of Nebraska.

On this point Dilworth states (p. 699): The system of making rates to interior points in Nebraska, in use by the companies, is not right, and that a rate made in conformity thereto is unjust and unreasonable, and results in discrimination against all points in Nebraska that are west of Lincoln." (p. 700):

"If an article comes direct from Chicago to Hastings on a rate proportioned to the Omaha rate, it will cost 97½ cents

per hundred pounds, but even if the roads should still keep up the present system of making rates after House Roll 33 goes into effect they can still charge $1.16 per hundred pounds fram Chicago to Hastings, or one and one-half mills per hundred pounds for the last one hundred and fifty miles.'

Local Shippers at all Points West of Lincoln Pay a Rate 3 1-2 Times Higher Than the Rate From Lincoln to Missouri River.

This differential operates as a discrimination against four-fifths of the State of Nebraska. This is made clear by the testimony of Mr. Dilworth. (pp. 709-710-711):

"Q. By that differential rate then, is all the territory of the State of Nebraska lying west of a line drawn north and south through Lincoln discriminated against by railway companies and compelled to pay a higher rate for freight traffic?

"A. They pay a higher rate than Lincoln does proportionately.

* * * * * * *

"Q. About what portion, geographically speaking of the State of Nebraska, is discriminated against by railway companies by reason of this differential rate?

"A. Four-fifths of it, I expect.

"Q. Thence that four-fifths of the State of Nebraska pays what percentage of higher rate under the established system than does that part of the territory lying east of Lincoln?

"A. The only way I can answer that is by taking what would be the rate to about the average station in the state; for instance, Hastings, and if Hastings has the same rate that Lincoln enjoys from Chicago, goods in the first-class could be laid down at Hastings for 97½ cents a hundred, and the rate now is $1.26.

* * * * * * *

"Q. If I understand you, the rate from the Missouri river to Lincoln is a differential rate, and is much less than the local rate to other points in the state, and Lincoln gets the benefit of that?

"A. Yes, sir.

Neb. R. R. charge majority of people a rate 3½ times greater than is charged to rest of state.

"Q. How much higher rate do the people have to pay for local shipments west of that line than are paid for these local shipments from the Missouri river to Lincoln?

"A. *Three and a half times as much.*

It needs no argument to show that to charge *four-fifths of the people* of the state a rate, for hauling their freight fifty-five miles, which is *three and one-half times* greater than is charged for hauling the freight of *one-fifth of the people* fifty-five miles, results in the taking of the property of four-fifths of the people for the benefit of one-fifth of the people, or the unjust taking of property from a majority of the people for the benefit of railway companies.

This Manner of Fixing Rates Ignores the "Equal Rights of All."

This manner of fixing freight rates must grate upon that public conscience which recognizes the right *of all the people* to equal protection under the law. There is a great difference between the rights of *some* of the people and the rights of *all* of the people.

Rate fixed for benefit of few.

Charters and privileges granted to railway companies are for the benefit of *all* the people, and not for the benefit of *a few* people.

It is clearly within the province of governments to legislate for the protection of the welfare and property of *all* the people, and to accomplish this end, and in this spirit the *Maximum Freight Law* was enacted.

ANDREWS, J., in *People vs. Budd*, 117 N. Y., 7, properly says:

"But the very existence of government presupposes the right of the sovereign power to prescribe regulations demanded by the general welfare for the common protection of all. This principle inheres in the very nature of the social compact. The protection of private property is one of the main purposes

People vs. Budd.

Secure equal rights to all.

of government, but no one holds his property by such an absolute tenure as to be freed from the power of the legislature to impose restraints and burdens required by the public good, or proper and necessary to *secure the equal rights of all*,"

The humblest individual in the land has a right to demand the use of public highways on terms as favorable as those granted to accumulated wealth.

As said in *Schofield vs. Railwry Co.*, 43 Ohio St., 571:

"We do not believe a railroad company should act unjustly; that it should favor one man more than another; that it should favor one place more than another; or that it should crush out one person for the purpose of advancing the fortunes of another."

PATTISON COMMITTEE ON DISCRIMINATION.—The subject matter of discrimination in freight rates was investigated by the Pattison Committee. From the report of that committee it appeared that the Union Pacific Railway Company has been indulging in unlawful discrimination since the inception of the road.

Pattison Com. on discrimination.

"As a common carrier the Union Pacific was under obligations to carry for all persons on equal terms and rates without discrimination, and to charge reasonable and just rates for its service. But the inflation of its capital and indebtedness to the extent of seventy millions of dollars at the inception of the enterprise precluded the possibility of fair rates except in rare cases of healthy competition. In fixing rates the Union Pacific Company started out on the principle of charging all the traffic would bear." (p. 1181.)

Inflatisn of capital $70,000,000.

From the testimony of the complainant's witnesses, Mr. Fink and Mr. Utt, it would seem that the Union Pacific Company has not yet forgot its cunning, and furthermore that all the railway companies, as a matter of principle, pursued and are still pursuing the same irregular course.

"Many complaints were made to the commission in different towns in Kansas and Nebraska, at Denver, Fort Collins, Cheyenne, Laramie, Leadville, Ogden, and Salt Lake City,

of partiality and preferences extended by the Union Pacific Railway Company to those whom it desired to favor, and that the companies so adjusted their freight rates as to drive out of business those who had not their favor. Complaint was also made that the Union Pacific Company had monopolized the stone business at the Stout quarries and the coal business at the Marshall mines." (p. 1159).

Favoritism.

"When the commission visited the communities which were served by the Union Pacific Railway Company, there was a general complaint of high rates. But the greater complaint made by shippers was against discriminating rates. If rates were uniform, certain and permanent a shipper knew that skill, ability and enterprise would help him on, but when the question became one of favor with the railroad managers, then capital was paralyzed.

"Farmers complained (see p. 1527) that they could not get rates for shipment to Chicago within five or eight cents of the figure which the elevator men obtained.

"The firm of Himebaugh & Merriam, of Omaha, owns thirty-two elevators along the Union Pacific system, and when the farmers at Marysville, Kansas, tried to ship directly to the market, they found they could not compete with that firm. Their complaint was that three-fifths of the product of their labor went to the railroad company, one-fifth to interest and one-fifth was left for subsistence. At Marysville, Kansas, it

Effect on grain rates.

was testified (see p. 1540) that at one time the Union Pacific Company reduced its rates on corn from 32 cents to 27 cents per 100 pounds, to enable farmers to ship to market, but the rate went back again to 32 cents as soon as the market justified it. It, therefore, mattered little to the farmer whether his crop was large or small. If large, the company appropriated a considerable proportion of it in high rates; if small, it only allowed him enough to live on.

"The complaints of localities and of various industries were of the same tenor. A few concerns monopolized the entire trade of the territory tributary to the road and dictated terms to the company for their own advantage." (p. 1185).

Utt on sugar rates.

Sugar and California Canned Goods.—It appeared from the testimony of Mr. Utt that the railway companies have been for a long time carrying sugar from San Francisco

to the Missouri river for sixty-three cents in order to allow Spreckles to put his sugar upon the Omaha and Lincoln market in competition with sugar from the markets of New Orleans and New York. He considered this rate given to Mr. Spreckles to be a very low rate by comparison, for that the haul was greater than the haul would be from either New Orleans or New York. It was conceded, however, that the Missouri river points could procure all the sugar from the southern and eastern market that it needed. The people were not benefitted by having the Spreckles sugar put upon the market. The low rate given to Spreckles was not to reduce the price of sugur in the Omaha market, but simply to allow Mr. Spreckles to unload his sugar at Omaha and have a share in the business. One of two conclusions must be drawn from this confession of Mr. Utt. Either the railway companies were showing a favoritism to Mr. Spreckles or the rate allowed Mr. Spreckles, was one that yielded to the railway companies reasonable compensation.

It seems to us the illustration given of the sugar schedule by the Circuit Court was unfortunate. If the railway companies could afford to haul sugar from San Francisco to Chicago at the rdte charged from Grand Island, Nebraska, to Chicago, the Nebraska rate must be too high.

It appeared from the testimony of Mr. Dilworth (p. 1037) that the railway companies did not extend this like favoritism or kind consideration to the consumers of sugar that were living out in the State of Nebraska. If the consignee of a cargo of sugar was at some interior town of the state, the railway company would haul the car directly by the town to which it was consigned and carry it on to the Missouri river, charging the consignee the full rate from San Francisco to the Missouri river, and then haul the car back from the Missouri river to the point of destination and add on the local rate of the return haul to the through rate from San Francisco to the Missouri river, or in some instances the railway company would

Double haul charged to interior Nebraska points.

drop off the car at the pnint of consignment, and would add on to the way bill the items of freight as if the car had been carried to the Missouri river and returned to the point of destination. Mr. Dilworth proceeded by way of illustration to say that if a carload of sugar was billed from San Francisco to a merchant in McCook, a point 300 miles west of the Missouri river, that the McCook merchant would be obliged to pay the freight rate on that sugar from San Francisco to the Missouri river, and have added thereto the additional local rate from the Missouri river to McCook. Upon what principle of law or of good conscience can such a system of freight rates be justified.

Similar questions were before the Pattison committee, and the chairman of that committee, among other things, says:

Complaints from Lincoln.

"The merchants of Lincoln, Nebraska, felt that they were so badly treated by the railroads which served that city that they organized a bureau of transportation, drew up protests to the railroad company, and presented arguments to the Interstate Commerce Commission against the discriminations under which that city labored. They made the general charge that the Union Pacific Railway company was destroying the wholesale business of Lincoln, and that the railroads which centered there had used the interstate commerce law as a lever to justify them in raising that rate on lumber from Missouri river points from 8 cents to 20 cents per 100 pounds. Mr. Raymond, a wholesale merchant of that city, charged that the Union Pacific company was discriminating against Lincoln and in favor of Omaha, and explained how Mr. Spreckles, the California sugar refiner, had obtained a special rate of 50 cents per 100 pounds to Nebraska City, Kansas City, Omaha, Leavenworth, Atchison and Lincoln. The Omaha merchants asked Mr. Spreckles to quote sugar one-eight of a cent per pound higher to Lincoln than to Omaha. Mr. Spreckles refused, and then the Omaha merchants appealed to General Manager Kimball, who struck Lincoln from the list of cities which were favored with the special rates and gave it a local rate. It was charged (see p. 1528) that the Union Pacific

refused to take sugar to Lincoln unless it had been shipped Through Omaha, and that this action of the railroad companies had almost ruined the Lincoln business in sugar." (p. 1188-1189.)

* * * * * * *

"Merchants in Columbus, Nebraska, complained that although they were ninety-one miles nearer San Francisco than Omaha, both being on the same line, they were forced to pay higher rates; that the rate from Omaha to San Francisco was $1.40 per 100 pounds, while the rate from Columbus to San Francisco was $3 and the only way they could ship to San Francisco was by way of Omaha. The charges in connection with the cattle business were so high that the Columbus dealers were forced to quit. (See page 1477.)

Complaints from Columbus.

"In shipping to Memphis from Columbus, the rate to Papillion, for a distance of seventy-five miles on the Union Pacific, was 5 cents greater thon from Papillion to Memphis, Tenn., a distance of 500 miles, on the Missouri Pacific. In other words, the rate from Columbus to Papillion was 30 cents and from Papillion to Memphis, 25 cents.

"Similar complaints were made by the people of Grand Island. Mr. Hedde, of that place, declared that a carload of nails from Pittsburg via Saint Louis to Council Bluffs, a distance of more than 1,000 miles, cost less than from Council Bluffs to Grand Island, a distance of 150 miles." (p. 1189.)

INTERSTATE COMMERCE ACT.—It was hoped by the people that when Congress enacted the Interstate Commerce law that trade would be relieved from oppressive rates and that reductions in rates would be brought about where needed. It probably is true that throughout the railway systems of the country more reasonable rates have been established, and in many instances discriminations brought to an end. It has now become a matter of history that the railway companies used their utmost endeavors to defeat the enactment of that law, and later on to avoid the enforcement of its provisions upon the proposition that that law would tend to the equalization of rates among all the people, and would therefore interfere with the right of

R. R. opposed Interstate Commerce Act.

the railway companies to adjust rates to build up local ind tries and to favor localities. We have something of the sa sort in the present case. Mr. Utt undertakes to show that enforcement of the Maximum Freight Law of this state wo tend to disturb the rates on interstate commerce. In short proposition is that the equalization of rates among the peo would disturb present rates fixed upon interstate shipmen We do not stop now to argue this point, whether it is true not, but simply to put it in juxtaposition with the argume of the railway companies, heretofore used against the enfor ment of the Interstate Commerce Law.

Some objections to maximum freight rates.

The Interstate Commerce Act. however, has proven in fectual to prevent discrimination in all cases of interstate sh ments, and of course is of no effect on local shipments. Up this point the Pattison Committee found the following:

"The Union Pacific Railway Company has taken adva tage of the interstate commerce law to oppress trade, havi used the application of that law as a pretext for a general i crease of rates, varying from 20 to 33 per cent. The decisi of the Interstate Commerce Commission relative to the suspe sion of the 4th section has been availed of by the companies a justification for outrageous discriminations. In place pools, which were prohibited by that act, the companies ha substituted 'agreed rates.' The prohibition of pools contain in that act has simply forced a change in the nature of t combinations from agreements for division of earnings or ter tory or traffic to agreements for the maintenance of rates whi are unreasonable. It is not strange that the company, wh mining and selling coal, and quarrying and selling stone wi the power to drive all competitors out of the market, shou exercise that power for its own temporary advantage and the injury of those whom the government is bound to protec As was stated on page 233 of the Government Director's R port, the company claims that self-preservation forces it condone or practice these discriminations." (p. 1189-1190

Evils in local rates not remedied by Interstate Commerce Act.

All Manner of Discriminations by Railroads, Whether in Favor of Localities Against Other Localities, or in Favor of Large Shippers Against Small Shippers, or in the Form of Rebates, is Loudly Complained of by the Courts as Against Public Policy, and Should Be Forbidden by Law, Even to the Extent of Establishing Rates by Legislation.

Scofield vs. Railway Company, 43 Ohio St., 571, is a case where a contract between the Standard Oil Company and Railway Company was held illegal and void in that it discriminated in favor of the Standard Oil Company against small shippers. Scofield vs. Railway Co.

The court, among other things, said:

"The discrimination complained of rested exclusively on the amount of freight supplied by the respective shippers during the year. Ought a discrimination resting exclusively on such a basis to be sustained? If so, then the business of the country is in some degree subject to the will of railroad officials; for if one man, engaging in mining coal, and dependant on the same railroad for transportation to the same market, can obtain transportation thereof at from twenty-five to fifty cents per ton less than another competing with him in business, solely on the ground that he is able to furnish and does furnish the larger quantity for shipment, the small operator will, sooner or later be forced to abandon the unequal business and surrender to his more opulent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to merchants, manufacturers, millers, dealers in lumber and grain, and to everybody else interested in any business requiring any considerable amount of transportation by rail; and it follows that the success of all such enterprises would depend as much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same.

* * * * * * *

"Capital needs no such extraneous aid. It possesses inherent advantages which cannot be taken from it. *But it has no just claim by reason of its accumulated strength, to demand the*

use of the public highways of the country, constructed for the common benefit of all, on more favorble terms than are accorded to the humblest in the land and a discrimination in favor of parties furnishing the largest amount of freight, and solely on that ground, is a discrimination in favor of capital, and is contrary to a sound public policy, violative of that equality of right guarranteed to every citizen, and a wrong to the disfavored party, for which the courts are competent to give redress.

* * * * * * *

"We adopt the reasoning of BAXTER, J., as the better law, and hold that a discrimination in the rate of freights resting exclusively on such a basis ought not to be sustained. The principle is opposed to sound public policy. It would build up and foster monopolies, add largely to the accumulated power of capital and money and drive out all enterprises not backed by overshadowing wealth. With the doctrine as contended for by the defendant recognized and enforced by the courts, what will prevent the great interest of the northwest, or the coal and iron interests of Pennsylvania, or any of the great commercial interests of the country, bound together by the power and influence of aggregate wealth and in league with the railroads of the land, from driving to the wall all private enterprise struggling for existence, and with an iron hand thrusting back all but themselves?

* * * * * * *

"Defendant's counsel in his brief affirms: 'We do not believe a railroad company should act unjustly; that it should favor one man more than another; that it should favor one place more than another place, or that it should crush out one person for the purpose of advancing the fortunes of another.' We affirm that admitted doctrine and upon it declare the contract void."

Rothchilds vs. Wabash R. Co.

In *Rothschild vs. Wabash R. Co.*, 15 Mo. App., 245, it was said:

"The principle which forbids certain discriminations between persons who avail themselves of railway transportation depends upon a consideration of the common carrier's obligations to the *whole public* and to *everybody* constituting a part of that public. *Every such constituent is entitled to an equal and impartial participation in the facilities for which*

the corporation was created. Hence in *Hayes vs. Peen. Co.*, 12 Fed. Rep., 309, it was held that discrimination in the rates of freight charged by a railroad company to shippers, based solely on the amount of freight shipped, without reference to any conditions tending to decrease the cost of transportation, are discriminations in favor of capital and contrary to sound public policy. 'If one man engage in mining coal, and dependent on the same railroad for transportation to the same market, can obtain transportation thereof at from twenty-five to fifty cents per ton less than another competing with him in business, solely on the ground that he is able to furnish and does furnish a larger quantity in shipment, the small operator will sooner or later be forced to abandon the unequal contest and surrender to his more opulent rival.'"

So. Ex. Co. vs. Memphis R. R.

In *So. Ex. Co. vs. Memphis R. R.*, 8 Fed. Rep., 802, it was said by McCRARY, J.:

"It is the duty of such a company, as a public servant, to receive and carry goods for all persons alike, without injurious discriminations as to rates or terms."

Hays vs. Penn. Co.

In *Hays vs. Penn. Co.*, 12 Fed. Rep., 311, BAXTER, J., said:

"The defendant is a common carrier by rail. Its road, although owned by a corporation, was nevertheless constructed for public uses, and is, in a qualified sense, a public highway. Hence, everybody constituting a part of the public, for whose benefit it was authorized, is entitled to an equal and impartial participation in the use of the facilities which it is capable of affording. Its ownership by the corporation is in trust, as well for the public as for the shareholders, but its first and primary obligation is to the public."

Samuels vs. Louisville Co.

In *Samuels vs. Louisville & N. R. Co.*, 31 Fed., Rep., 57, it was ruled that it was no justification for a discrimination that the higher rate is not unreasonable.

The fact that the charges are unequal makes the one unreasonable.

BRUCE, J., said:

"In a case like the one at bar, can there be a reasonable charge which is not at the same time substantially an equal

charge? And is not a charge unreasonable when it is unequal, and in breach of the common obligation and duty of the common carrier to the public?"

These authorities, with others that might be cited, condemn every manner of favoritism and discrimination pointed out so far, and equally condemns the system of granting rebates to the favored few hereafter mentioned.

Local Rates Charged in Nebraska are Unreasonably High Compared with Rates in Iowa.

We have heretofore mentioned that the rates established by the Maximum Freight Law bear favorable comparison with the rates existing in Wisconsin, Minnesota, Dakota and Kansas. In that connection we drew attention to the fact that the present local rates in Nebraska are about 40 per cent. higher than in the states above named. We wish now more particularly to draw a comparison between the local rates charged in Nebraska with the local rates charged in the neighboring state of Iowa. Both Iowa and Nebraska are chiefly agricultural and grazing states. It is true that the entire population of Iowa is greater than the entire population of Nebraska, but the traveler over the two states will observe that the population in Nebraska in the Platte valley, through which the Union Pacific road runs, and in the Elkhorn valley, through which the Fremont & Elkhorn runs, and in the South Platte country, through which most of the branches of the Burlington road run, are about as thickly populated as is the territory in the state of Iowa. The thinly settled portions of Nebraska are in the western margin of the state, through which there are no railroads except the extensions of the main lines into foreign territory.

Local conditions compared with Iowa.

By looking at a railroad map of the state of Nebraska it will be observed that four-fifths of all the mileage of the rail-

road companies who are complaining of the present bill lies within the east one third of the state. That portion of Nebraska is as productive and yields as much tonnage for the railway companies per mile as any like proportion of the state of Iowa.

The testimony of the railway engineers, J. E House and Lester F. Wakefield, shows that the topography of Iowa is more rugged than that of Nebraska, and that it requires less of capital to construct a road in Nebraska than in the state of Iowa.

Costs more to build R. R. in Iowa than Nebraska.

It is not therefore a full answer to this comparison of rates to say, "In Iowa there are 230 people to each mile of railroad, while in Nebraska there are but 190."

It is true the witness. John E. Utt, undertakes to state several reasons why the railroad companies should be entitled to a greater local rate in Nebraska than in the state of Iowa, but the principal reason given by him relates to the cost of fuel. His contention is, in short, that the Iowa roads are nearer the coal fields than are the roads of Nebraska. On this question he sums up his argument, as follows, p. 443:

Utt on cost of coal.

"There is a disability of $1.50 a ton to a railroad in Nebraska, as against a railroad in Iowa, or Illinois or Missouri."

Again, (p. 444):

"In estimating that it costs $1.50 more to the railroads in Nebraska for their coal than it does in the neighboring states east of us, the estimate is certainly not too high. The roads in this state use about 700,000 tons of coal annually."

According to the above computation of Mr. Utt, the roads in Nebraska would pay out annually for coal $1,400,000.00 more than they would be called upon to pay out in the state of Iowa for the like quantity of coal. This does not mean, however, that the cost of local freight in Nebraska amounts $1,400,000.00 annually more than in Iowa. This extra cost for fuel must be apportioned to the *through business* as well as

to the *local business*, and to the *passenger business* as well as to the *freight business*. In computing the expense of different classes of transportation by the railroads 30 per cent. is apportioned to passenger business (p. 592), twenty-one per cent. is local business (pp. 568–569), and the remainder is interstate business. Apportioning this extra cost of fuel upon this basis, but about one-fifth of this extra amount for cost of fuel could be added to the cost of the local business, which is $280,000.00. This is but a mere bagtelle when applied to the operating expenses of all the roads in the state of Nebraska.

gatelle of 280,000.00.

Mr. Utt made the statement upon the mere supposition that it cost the railway companies $1.50 a ton to transport coal from the mines to points throughout the state of Nebraska. It happens, however, that all the roads traversing the state of Nebraska reach mines on its western border. The Fremont & Elkhorn reaches mines in northwestern Nebraska and Dakota. The Burlington reaches its own coal mines in Colorado and in Dakota. The Union Pacific company reaches its own coal mines in Wyoming. The cost of transportation of coal by the railway companies is comparatively nothing. Mr. Utt's computation was based upon the tariff rates charged to other people for hauling coal. The cost to the railway companies for hauling coal is an entirely different thing. They pay out nothing. They use their own cars, their own engines, their own tracks, their own employes. In many instances the coal is hauled in return cars that would otherwise be empty, and in connection with trains carrying other freight, so that the cost of the transportatien of the coal in the state of Nebraska for the use and benefit of the railway companies is not $1.50 a ton, as stated by Mr. Utt, but a mere nominal sum. The fact is, that it cost the Union Pacific Railway company in Nebraska no more for fuel than it cost the Burlington road in the state of Iowa for fuel. This is made definite and certain by the re-

t Nebraska nes have coal ines.

t only nom- al.

ports made by the two respective railway companies from which it was made to appear that the average cost of coal per ton to the respective roads in Iowa and in Nebraska is each $1.40 a ton (p. 1103):

"Q. Mr. Dilworth, I desire to call your attention to question of the cost of coal to the Iowa roads and the Nebraska roads about which you were cross-examined, and ask you to state if you know what it costs the Iowa roads for coal?

Cost of coal same in Nebraska and Iowa, $1.40.

"A. I know what it cost the C., B. & Q. road for 1892.

"Q. How much was that?

"A. $1.40.

"Q. Now, do you know how much it costs the Union Pacific road for coal?

"A. For the same year?

"Q. Yes, sir; how much?

"A. $1.40 * * *

"Q. Then I understand you the cost to the Burlington in Iowa and the Union Pacific in Nebraska is the same for coal?

"A. Yes, sir."

There is another story in the coal business in favor of the Nebraska roads. The people of the state of Nebraska, being obliged to go outside of their state for coal, the Union Pacific company has taken advantage of that situation. It acquired valuable and extensive coal mines within the limit of the Government Land Grant in Wyoming, so that its coal mines cost it nothing. The Union Pacific only pays for coal the expense of taking it from the mines and delivering it in the cars. The whole expense to that company, including the distribution to the points upon its line, according to its own statement, was $1.40 a ton. The Union Pacific Company, however, delivers that coal at all points in the state of Nebraska, from its own mines, and sells the same at prices ranging from $6.00 to $7.00 per ton (p. 1105).

R. R. sell same for $6.00 to $7.00.

"Q. Aside from that what do you know about the Union Pacific making a profit out of its coal mines?

It of $1,000,000 year.

"A. Well, they sell their Rock Springs coal on the market of this state, and it costs consumers anywhere from $6.00 to $6.50 and $7.00 a ton.

"Q. Is not the coal of the Union Pacific sold in Omaha in competition with the Iowa and Missouri coal?

"A. Yes, sir; it comes in competition with them most anywhere in the state where the Union Pacific can deliver coal." (p. 782.)

From the above testimony it appears that the Union Pacific Company has a clear profit of from $4.50 to $5.50 on every ton of coal it sells in the state of Nebraska. There are hundreds of thousands of tons of this coal used in this state. Instead of the question of coal being an extra expense to the Union Pacific Company, it is made a source of revenue of more than a million dollars a year, in the state of Nebraska alone. If the coal question is to affect the local tariff rates at all, in view of all the facts, it would justify lower local rates in the state of Nebraska than are charged in the state of Iowa.

The Local Rates in Nebraska are 40 to 50 per cent. Higher Than They are in the State of Iowa, and Without Justification.

Mr. Dilworth on this point testified, (p. 701):

"Can you state in a general way how much higher are the local rates which are charged by the roads within the state of Nebraska than are the local rates charged by the railroads within the state of Iowa for the like kinds of shipments?

0 50 per cent. gher in Ne- aska than wa.

"A. Well, my estimate would be from forty to fifty per cent. higher.

"Q. How long have the rates in Nebraska been forty or fifty per cent. higher than within the state of Iowa?

"A. I believe for about four or five years; anyhow, as long as I have been on the board.

"Q. Do you know of any good reason to justify any

n, or so great a degree of difference as exists in the local ght rates in these two different states?

"A. Not at the present time; no sir, I do not.

"Q. Have you compared the rates which are set down in Newberry bill with the local rates which are charged in state of Iowa, so as to be able to state how they compare, one with the other?

"A. Yes, sir.

"Q. How do the rates set down in the Newberry bill pare with the local rates which are charged by these rail-s in the state of Iowa?

"A. Higher.

"Q. Which is higher?

"A. The Nebraska House Roll 33 are higher than the a rates."

Newberry rates are higher than Iowa rates.

There is a table attached to the answers of the State rd of Transportation in the respective cases, showing the parison of rates in the state of Iowa with the rates fixed the Newberry bill in Nebraska, which was prepared by Mr. worth, and which he testified to be correct (p. 1024). A nce at that table (Exhibit "D," pp. 75-307 to the answers) l show that much more liberal rates are allowed by the New-ry bill in Nebraska than are allowed in the state of Iowa. we are to judge of this question by comparison *if the Iowa l rates are reasonable*, then the rates established by the wberry bill in Nebraska are certainly not unreasonably low, they *are much higher than the rates in Iowa.*

This appears by a table pp. 75, 307.

That is but one phase of the question, however. The es which the roads in *Nebraska are now exacting* are 40 per t. higher than the rates in the Newberry bill and are *40 or per cent. higher than the local rates in the state of Iowa.*

Illustration—*Corn*: The rates charged by the Nebraska ads for the shipment of corn are unreasonable, unjust and rbitant.

Corn.

The rate for hauling corn a distance of fifty miles in Ne-

braska, is nearly one-half as much as for hauling the same corn 500 miles, from the Missouri river to Chicago. On this Mr. Utt testified: (p. 526-527).

"Q. With reference to the transportation of corn from points in Nebraska to Chicago, taking Fremont for the starting point, as an illustration, what would be the through rate to Chicago?

"A. I think 22 cents.

"Q. Now that is what you call through shipment?

"A. Yes, sir.

"Q. How is that rate apportioned between the respective roads, the part within the limits of Nebraska and that part of the road beyond the territory of Nebraska?

rn 9 cents for 0 miles in Neb.

"A. The line in Nebraska gets forty-five per cent. and the line east fifty-five per cent. of the rate.

"Q. So that of the 22 cents the Nebraska road from Fremont to Omaha would get more than nine cents?

"A. Yes, sir.

cents to Chicago 500 miles.

"Q. And from *Omaha to Chicago* would get a little over 12 cents.

"A. Yes, sir.

"Q. From *Fremont to Omaha* is how many miles?

"A. *About fifty, I think.*

"Q. And from *Omaha to Chicago* is how many?

"A. *Five hundred.*

"Q. Does that apply to all the roads over which corn might be shipped from Fremont to Chicago?

"A. That is the same rate in effect upon all of the roads?

"Q. Yes, sir?

"A. Yes, sir.

"Q. And there would be the same apportionment of the freight, would there?

"A. The other route would be the Elkhorn and Northwestern; I suppose that is a fact.

"Q. The Northwestern and the Rock Island, the same thing could be done by shipping from Fremont to Omaha, and then over the Burlington?

"A. Yes, sir.

"Q. Now what you have stated as to the apportionment

of the freight between the line from Fremont to Omaha and the various railroads from Omaha to Chicago, likewise applies to *other articles of merchandise* that would be shipped from Fremont to Chicago, does it not?

"A. *Yes, sir.*

Same ratio of rates to other articles.

REBATES.—Another reason why rates in Nebraska are unreasonably high is made manifest from the extensive rebates and favoritism shown by the Nebraska roads to certain persons and certain interests. The fact of allowing rebates is of itself proof that the rates set down in the tariff sheets are unreasonably high. There is another evil in the allowance of extensive rebates which is that the amount of such allowances falls to a considerable extent upon the general public, or in other words, in order to justify or permit the railroads in allowing extensive rebates excessive charges to that extent are burdened upon the mass of shippers to make up the deficit thus arising. In the report of the Interstate Commerce Commission for 1890, (p. 30), it is said:

Rebates show rates are high.

"*If rebates* are given to large shippers, the *fact of itself* shows the *rates which are charged to the general public are unreasonable*, for they are necessarily made higher than they ought to be in order to provide for the cut or to pay the rebate. It is a very erroneous notion that the results of a cut or a rebate fall only upon the carrier, they fall at last to a considerable extent upon the public, and those who pay full rates largely make up for every allowance that is made to those who do not; if the carrier habitually carries a great number of people free, its regular rates are made the higher to cover the cost; if heavy commissions are paid for obtaining business, the rates are made the higher that the net revenues may not suffer in consequence. if scalpers are directly or indirectly supported by the railroad companies, the general public refunds to the companies what the support costs, and in every one of these cases the fact of improper drafts upon the gross revenues, or of improper reductions of what ought to go to swell the revenues, is proof that the rate sheets are too high."

To allow rebates is to add to rates others pay.

The court will readily understand that in the case at bar we had neither the time nor the opportunity to make a full in-

vestigation of this subject. Portions of the report of the Pattison committee were introduced in evidence to show the enormous extent to which this evil has been carried by the Union Pacific company. Pattison states:

Iniquity of rebates.

"The rebate book was used as the hiding place for the iniquities in the system. Payments that were not made to buy trade or to buy perce were put in there. It was one of the India rubber accounts of the company. Opportunities for the rankest favoritism and corruption were invitingly spread before the officers of the operating department, and by the secrecy of these accounts the company gave to favored shippers great advantages which it refused to give to others. Ex-Senator Hill of Denver, said that his smelting works would have gone into the same business as the Omaha & Grant Smelting and Refining Company if he could have had any assurance that he could get the same rates. (p. 1178).

Omaha smelting company.

"The Omaha & Grant Smelting and Refining Company received rebates of *$570,000 in a period of three years*, and, in addition, was allowed free switching in its yards, which was worth $15;000 a year, while other smelting companies were forced to pay switching charges. Among the *stockholders in this company were Mr. Sidney Dillon and Mr. Fredkrick L. Ames, directors of the Union Pacific Railway Company.*

Ex-Senator Hill.

"The testimony taken at Omaha, at Denver and at Salt Lake City showed that other smelters had been refused the rates that were given to the Omaha & Grant company. Senator Hill, who represented the Boston & Colorado Smelting Company of Denver, declared that his company would have been in the same business as the Omaha & Grant company if he could have obtained any assurance of getting the same rates as that corporation. He had repeatedly applied to the president and officers of the company for rates, but had never been able to obtain them.

"The miners of the Wood River country in Idaho were forced to sell their ores to the Omaha & Grant works, at Omaha, and to pay $11 per ton for smelting, the total cost of transportation and smelting being $34 per ton, while the miners of Butte and Helena were allowed to send their ores to Salt Lake City at a cost of $8 for transportation and to pay only $8 for smelting, making a difference between $34 per ton

for the transportation and smelting of the Wood River ores and $16 for the Butte and Helena ores.

"The transportation rates from the mines of Leadville to Denver were so adjusted that the smelting business was driven away from Leadville to Denver, so that of the twenty-three furnace stacks in Leadville less than one-half were running when the commission visited that place. The method adopted by the Union Pacific company was to charge only $5 for transporting a ton of ore and $12 for a ton of bullion, the effect being to force the smelting business into the Denver branch of the Omaha & Grant Smelting Works. The Leadville people complained of these unbalanced rates declaring that either the rate on ore was too low or the rate on bullion was too high, and they showed that by fixing the rate on bullion at $12 per ton the smelters of Leadville were unable to remain in business. To use their own words, 'the Leadville smelting business had been crushed since the Omaha & Grant works were established in Denver, four years ago.' They also complained that the charge for transporting bullion between Leadville and Denver was higher than for any similar service in the country, being at the rate of eight cents per ton per mile.

"When the president of the Union Pacific Railway Company was asked to explain why it had discriminated in favor of the Omaha & Grant works, he said that the other roads into Denver were backing other smelting establishments, and that the Union Pacific therefore backed the Omaha & Grant works against all other smelters in that system. He admitted that it was a great evil (p. 1997), and that it was a vicious way of conducting business, but confessed his utter inability to remedy the evil.

"As a result of the discriminations which the Union Pacific made in favor of the Omaha & Grant company its business has been built up to such proportions that it is now pratically able to dictate its own terms to the railroad company.

"The firm of Himebaugh & Merriam, at Omaha, which owns thirty-two elevators on the Union Pacific system, stated (see p 1301) that it had no competitors on the line of the Union Pacific except the Union Elevator Company of Council Bluffs. The elevators at Omaha and Council Bluffs have been allowed one cent as a terminal charge for transfer through

Rebates to elevator companies.

their elevators, and two cents additional, at times, to meet competition. The testimony developed the fact that farmers were forced to sell to Himebaugh & Merriam, or at least they could not compete with that firm in shipments.

"The firm of Lyman & Wallace, under the names of the Utah Forwarding Company and the Northwestern Forwarding Company, has occupied a similar relation to the Union Pacific Railway Company in connection with its salt and coke business. The Railway company, upon the pretext that it wanted to protect the smelters at Butte from corners in salt, determined to buy salt for delivery to it at Ogden, and fixed $3 per ton as the price which it would pay. A firm in Ogden offered to furnish salt to the railroad company at $1.75 per ton, but this proposal was refused, and the railway company paid Lyman & Wallace and the firm of Adams & Keisel $3 per ton for salt delivered at Ogden." (pp. 1183-1186.

Lyman & Wallace.

"The Union Pacific company has granted to the Standard Oil company, the Continental Oil Company and the Consolidated Tank Line Company, since 1880, large sums in rebate, and it has made its entire territory inaccessible to other oil shippers.

Standard Oil Co.

"The Union Pacific Railway Company also controls the retail price of coal along its entire system, and because of the fact that coal yards are established on its right of way, coal dealers before embarking in the businesss must obtain the consent of the company. In order that it might retain a complete monoply of the coal traffic, it refused to lease any of its coal lands on royalty, and it acquired unlawfully, by private entry and by the use of the names of its employes, the ownership of the government coal lands adjoining its own property, its total investment in that direction amounting to $198,000. Until recently it owned a number of mines in Northern Colorado, but a bargain was made between Mr. Charles Francis Adams and the Marshall Consolidated Coal Mining Company by which the entire coal business of the Union Pacific company in that state, south of Greeley, Colorado, was practically transferred to the Marshall company, and an agreement was made to allow rebates, on the principle that it would pay the carrying company better to carry 200,000 tons at 60 cents per ton than 100,000 tons at $1 per ton. After this arrangement had been consummated coal dealers and coal miners in that state became aware of the fact that some compact, which was inimical to

Monoply of coal trade.

their interests, had been made by the company, and complaint was made to its officers, but the complaints were made with pointed and positive denials of any rebate allowances." (pp. 1186-1187.

"In granting rebates the company followed no rule, and its published tariffs were worthless except for charges against the government. All rebates were put on overcharge blanks, so that it was difficult, from the face of the voucher, to ascertain whether the rebate allowance was an allowance by agreement or an allowance for error. *A thorough examination of the rebate system of the Union Pacific Railway Company leads to the conclusion that it was the policy of the company to concentrate business in a few hands, thereby building up a few men at the expense of others.*" (p. 1187.)

PATTISON REPORT COMPETENT EVIDENCE.—This report has become a matter of public history of which the court should take judicial notice. Further than that the report was competent evidence. This commission was directed by an act of Congress of March 3d, 1887, to investigate and report to Congress the matters and things in the act provided. The report of the commission was transmitted to Congress January 17th, 1888, accompanied by a message from the President of the United States. The message was read and the report ordered to be printed by the Senate of the United States. The printed volume was thus made competent evidence.

Pattison report as evidence.

Watkins vs. Holman, 16 Peters, 25, is directly in point. In that case there was offered in evidence a volume of documents containing reports of certain commissioners appointed under an act of Congress, which related to the title of real estate in controversy in the suit. To get before the court the report of these commissioners, a public document was offered in evidence.

Watkins vs. Holman.

MCLEAN J., said:

"The volume of state papers offered in evidence by the defendants, we think, should have been admitted. This volume was published under an act of congress, and contains

the authentication required by the act. Its contents are, therefore evidence. * * * * * *

"In this country, in all public matters, the journals of Congress and of all the state Legislatures are evidence; and also the reports which have been sanctioned and published by authority. This publication does not make that evidence, which intrinsically, is not so; but it gives in a most authentic form, certain papers and documents. In the case under consideration the volume of documents was offered to show the report of certain commissioners under an act of Congress confirming the title in question. Now, this original report, duly authenticated by the Treasury department, to which it was made, would be evidence, and it is evidence in the published volume. The very highest authenticity attaches to these papers, published under the sanction of Congress."

Bryan vs. Forsyth, 19 How., 334, is a case where it was sought to introduce in evidence the printed report of Edward Coles, register of land office at Edwardsville, as found in the American state papers. Objection was made to the introduction of this document, without proof of its authenticity. The court held that a public document was properly admissible in evidence.

Bryan vs. Forsyth.

MR. JUSTICE CATRON, said (338):

"In the progress of the trial in the Circuit Court, the plaintiff offered in evidence the printed report of Edward Coles, the Register of the Land Office at Edwardsville, as found in the American state papers, volume 3, from pages, 421 to 431, inclusive, to which the defendant objected because it was not without proof of its authenticity, legal evidence. But the Court overruled the objection, and the report was given in evidence to the jury to which ruling the defendants accepted.

"These state papers were published by order of Congress, and selected and edited by the secretary of the Senate and clerk of the House. They contain copies of legislative and executive documents, and they are as valid evidence as the originals are from which they are copied; and it cannot be denied that a record of the report of Edward Coles, as found in the printed journals of Congress, could be read on mere inspection as evidence that it was the report sent in by the

secretary of the Treasury. The competency of these documents as evidence in the investigation of claims to lands in the courts of justice has not been controverted for twenty years, and is not open to controversy."

In *Gregg vs. Forsyth*, 24 How., 179, it was held that a volume of American state papers, published by Duff Green, under the revision of the secretary of the Senate, and by order of the Senate, contained authentic papers which were admissible in evidence, without further proof. Gregg vs. Forsyth.

Mr. Justice Campbell, said:

"The plaintiff derived his title from the patentees. In tracing his title, he read a document relevant to the cause from a volume of American state papers, public lands, selected and edited under the authority of the Senate of the United States, by its secretary, and printed by Duff Green. This was objected to and the question reserved by the defendants. The volumes of the American state papers, three of which were published by Duff Green, under the revision of the secretary of the Senate, by order of the Senate contained, authentic papers which are admissible as testimony without further proof."

Whiton vs. Albany & Narragansett Insurance Companies, 109 Mass., 24, is a case where there was offered in evidence public documents which contained among other things, a communication from Louis Carr from the state department to the Honorable Secretary of the Navy. Whiton vs. A. & N. Ins. Co.

Objection was made to the introduction of this volume, but it was ruled that it was properly receivable in evidence.

Gray, Justice, said:

"Acts of Congress, and proclamations issued by the secretary of state in accordance therewith, are the appropriate evidence of the action of the national government. *Taylor on Ev.* (5th ed.) Sec. 1473. *1 Greenl. Ev.*, Sec. 491. And the volume on public documents printed by authority of the United States Senate, containing letters to and from various officers of state, communicated by the president of the United

States to the Senate, was as competent evidence as the original documents themselves."

Wharton on Evidence, Vol. 1, Sec., 638:

Wharton on Evidence.

"The official proclamation and other public documents issued by the executive are to be received as *prima facie* proof of facts stated in them, when such facts are relevant. State papers, when published under the authority of Congress, have a like effect. Thus the diplomatic correspondence communicated by the President to Congress, has been held in this sense evidence of the facts communicated. So the ordinances of the foreign states, promulgated by Congress, are held proved by force of such promulgation. Army registers, when authenticated by the secretary of war, have been held to be proof of the names of officers, of the dates of their commission, and of their resignations, though they cannot be received to show the pay and emoluments of officers. The proclamation of a governor of a state is *prima facie* evidence of the result of the elections which it recites: The printed report of a state comptroller to the legislature is *prima facie* evidence of the pertinent facts recited; and so is a charter of a city."

Ames vs. U. P. Ry. Co.

In the late opinion delivered by Judge Caldwell in the Union Pacific wage question he made reference to the report of the *Pattison committee.* He said the facts in the report had become *public history of which the court would take judicial notice.*

Ames vs. Union Pacific Ry. Co., 62 Fed. Rep., 7-13.

THEORY OF PROFITS.

The Opinion of the United States Circuit Court was Based Upon the Theory That the Railway Companies Were Entitled to Make Such Rates as Would Yield a Profit.

The Evidence in this Case Was Taken at a Time When There was a Drought in Western Nebraska and a Depression in Business. Upon the Theory

That the Railway Companies Were Still Entitled to Earn a Profit the Logic of This Would be That the Railway Companies Would be Justified in Increasing Rates in the Ratio of the Decrease in Business.

The Converse of the Proposition Would Be True. In Times of Financial Depression, all Other Values go Down and Railway Rates Should go Down in Like Proportion.

Would the Owner of a Building be justified in increasing Rents Because the Number of his Tenants Diminish?

The decree of the United States Circuit Court granted leave to the State Board of Transportation "when circumstances have so changed that the rates fixed in said act shall yield to such companies reasonable compensation" to apply to the court by supplemented bill or otherwise for further order.

According to the opinion of the court, this proviso was inserted in the decree on the theory that if the amount of business increased so as to yield a profit to the railway companies, then such application might be made by supplemental bill for further order.

Put in another form that means this: That when the financial depression shall have disappeared and business revived, then the injunction granted against the enforcement of the law might be removed.

Our contention is that when the value of all articles of merchandise are reduced by reason of financial depression, that was a time when the producer and shipper had a right to ask for lower rates. We would apply the same business principles to railroad tariff rates that we would apply to the rentals of property.

When business is good values are high, and the people can afford to pay higher rates than when business is depressed and values low. The rule which the court applied to the facts in this case was the converse of this proposition which we here state.

Does the Result of the Computation of the Circuit Court, as Found in the Table, p. 2173 of Opinion, Justify the Injunction? Query.

	Gross receipts or total amount received for tons hauled locally	Percentage of expenses to earnings	Cost of hauling local freight	Net earnings from local freight	Total amount of reduction caused by H. R. 33	Net earnings if rates prescribed in H. R. 33 had been in force	Deficiency from same cause
B. & M. R. R. R. in Nebraska	$1,237,884	64.23	$759,092	$442,792	$365,175	$77,617	.....
C., St. P., M. & O.	123,033	65.96	81,152	41,881	36,294	5,587	.....
F., E. & M. V.	336,714	70.71	238,090	98,624	99,310	.....	$ 686
U. P. Ry.	398,262	56.44	224,779	173,483	117,487	55,596	.....
O. & R. V.	88,335	93.12	82,257	6,078	26,043	.....	19,965
St. J. & G. I.	31,004	74.23	23,014	7,990	8,836	.....	846
K. C. & O.	6,630	75.19	4,985	1,645	1,889	.....	244

The table, as computed by the court, omits consideration of all and singular the matters heretofore mentioned in this brief.

Table shows a net profit to all main lines.

From the matters stated on its face we do not think it justifies the granting of the injunctions.

It will be noticed it leaves a *net profit* to the *main lines* of road, to-wit: the Union Pacific and the Burlington & Missouri river in Nebraska. The roads to which it does not leave a net profit are feeders or branch lines of the pricnipal defendant roads.

Net profit after deducting deficits on branch lines.

In the case of *Budd vs. New York*, 143 U. S., 517, the law left no profit whatever for the service performed. The rates fixed were the actual expenses. Yet it was said in the opinion: "In the cases before us the records do not show that the charges fixed by the statute are unreasonable."

Budd vs. New York.

The amount of profit is for the legislature to consider, not for judicial determination. In *Chicago & N. W. Ry. vs. Dey*, 35 Fed. Rep., 878, BREWER J., said:

"Counsel for complainant urge that the lowest rates the legislature may establish must be such as will secure to the owners of the railroad property a profit on their investment at least equal to the lowest current rate of interest, say three per cent. Decisions of the Supreme Court seem to forbid such a limit to the power of the legislature in respect to that which they apparently recognize as a right of the owners of the rail road property to some reward; and the right of judicial interference exists only when the schedule of rates established will fail to secure to the owners of the property some compensation or income from their investment. *As to the amount of such compensation, if some compensation or reward is in fact secured, the legislature is the sole judge.*

Chicago & c. vs. Day.

"The question is, then, one alone of policy. Whether by reducing the compensation to a minimum, railroad enterprises shall be discouraged, or enlarging, encouraged, is a matter for legislative and not judicial determination. Take a kindred matter. It is within the power of the legislature to prescribe the rate of interest and to punish by severe penalties

the execution of larger than the legal rate. What that legal rate shall be if not for the courts, but the legislature, to determine. Suppose the legislature of Iowa should reduce the legal rate of interest to one per cent., although such legislation would prevent capital from coming into the state, would the courts have power to declare the law unconstitutional? In *like manner the rulings of the Supreme Court imply that the legislature may reduce railroad rates until only a minimum of compensation is secured to the owner.*"

It is Questionable if the Plaintiffs Have any Standing in a Court of Equity to Ask an Injunction in Behalf of These Subordinate Roads, as They are Not Stockholders or Bondholders Thereof.

Plaintiffs no right to an injunction on account of deficit on branch lines.

In the Union Pacific case the plaintiffs are stockholders of the Union Pacific Railway Company. The Union Pacific Railway Company holds and owns the stock and bonds of the Omaha & Republican Valley Railway Company, and operated the St: Joseph & Grand Island railroad under a lease. The Kansas City & Omaha Railroad Company is a branch line of the St. Joseph & Grand Island road.

In the Chicago & Northwestern Railroad Company case the plaintiffs are holders of stock and bonds of the Chicago & Northwestern Railway Company. The Chicago & Northwestern Railway Company holds the stock and operates the Fremont, Elkhorn & Missouri Valley railway and the Chicago, St. Paul & Omaha company.

In the Chicago, Burlington & Quincy case there are no subordinate roads made parties defendant.

The point we make is that *none of the stockholders or bondholders* of the *subordinate lines*, to which a deficiency is found in the foregoing table, *are plaintiffs in these suits* and the *companies are not complaining.*

The rights of the plaintiffs in these branch lines is a re-

note or contingent right. Of course, the plaintiffs are, in some degree, interested in the income of the branch lines, but only as the income of the principal companies are affected thereby. Creditors of the individual plaintiff stockholders are also contingently interested in their individual income, but such interest would be too remote to allow such creditors the right to maintain a bill to enjoin the enforcement of freight rates. The plaintiffs have no direct interest in these subordinate companies.

Interest of Plaintiff too remote.

The Law Should not be Held Unconstitutional and the Rates Unreasonable for the Single Reason that the Enforcement of the Rates Would Not Leave or Create a Net Profit to Roads Whose Local Business has Always Been Unprofitable.

The St. Joseph & Grand Island railroad, considered as an independent line, has always been unprofitable. Mr. Mink testified for the Union Pacific company that the annual deficits of the St. Joseph & Grand Island road were as follows: (p. 702).

St. Joe & Grand Island always unprofitable.

Deficit for	1889	$ 60,002.85
"	1890	185,328.14
"	1891	260,296.48
"	1892	63,466.90

Here is a road that was not making any money out of its local business. The rates which this road voluntarily enforced did not yield it any profit, so far as appears in this record.

QUERY: *Must a judicial reasonable rate be one that yields the company a profit over its expenses?*

If so, we must make a law that would so fix rates for the St. Joseph & Grand Island as to yield it a profit.

Following out the same thought, is it not apparent that a rate which would yield a profit to the St. Joseph & Grand

Island road might yield an enormous profit to the Union Pacific or the Burlington & Missouri River Railway Company?

The Omaha & Republican Valley is another unprofitable subordinate road or branch line. Mr. Mink stated the deficits on the Omaha & Republican Valley to be: (p. 377).

& R. V. was ways unprofi- able.

In 1889 the deficit was	$326,256.27
In 1890 " " "	471,535.63
In 1891 " " "	515,779.95
In 1892 " " "	335,845.34

The reason for this deficit on the Omaha & Republican Valley is apparent when you look at the character of the road. It is made up of several separate lines, aggregating 482 miles in length. Its various lines begin nowhere and end nowhere. They are scattered over the state of Nebraska like the geological footprints of extinct animals. A glance at the map showing the lines of the Omaha & Republican Valley company will convince anybody that it was never intended, expected nor designed that the company as an independent corporation should ever earn any money. It was a corporate name, under which the Union Pacific Railway Company drew under its control several separate and independent companies, and under which it built new lines in different directions for the purpose of seizing territory, to keep out competing rivals, and hoping thereby to draw to its main line traffic from which and out of which the main line of the Union Pacific would earn a profit.

peculiar character.

The Omaha & Republican Valley, and the St. Joseph & Grand Island, and the Kansas City & Omaha, for all practical purposes should be treated as a part of the Union Pacific Railway Company. Deducting the deficiencies on these three subordinate lines from the net profit of the Union Pacific for local business on the main line, you still have, according to the table, a net profit left to the Union Pacific company.

If a *judicial* reasonable rate is to be fixed high enough to yield a net profit for local business on each of the different

ines which enter into and compose a part of the *Omaha & Republican Valley company the rate would have to be necessarily double the present local rates enforced on the Burlington & Missouri River Railway line.* Let us illustrate: The Burlington & Missouri River railroad has a line direct from Omaha o Lincoln, distance fifty-four miles. The Omaha & Republican Valley line from Omaha to Lincoln is ninety-six miles. t will thus be seen that the Omaha & Republican Valley line etween the two points named would have about double the ength of mileage to operate. Thus, its operating expenses ould be nearly double that of the Burlington in carrying reight between the two points. Hence, on this theory, the maha & Republican Valley would be entitled to receive about louble the rate charged by the Burlington & Missouri River ailroad from Omaha to Lincoln in order to yield a profit on he business between these points.

A rate to yield a profit rates on branch lines would be higher than on main lines.

We could give a dozen other illustrations on the lines of he Omaha & Republican Valley which would lead to a like esult. Certainly it could not be *judicially* said that the maxiaum rate fixed by law must be one that would yield a net rofit upon the Omaha & Republican Valley line, as such rate ould yield an enormous profit on the B. & M. line.

We suggest, therefore, that the criterion of what shall constitute a reasonable rate is not necessarily confined to the question of profit on each particular shipment, or the profit to be derived from local business generally, but an all-important consideration is whether the rate from point to point is a reasonable one, having reference to the distance as well as to the value of the article carried.

Rate should be based on value of article and distance.

If a company builds a circuitous line for the purpose of apping a territory, having for its particular object the gathering of freight to be transported over its main line road as interstate business it is not to be expected, that the mileage of

the circuitous line will yield any particular profit upon its purely local business.

If it should be true that because a local or branch road, abstractly considered, is unprofitable, that it is beyond the power of the state to determine what shall be reasonable maximum rates for such roads, then what would become of the Interstate Commerce Act as applied to the Omaha and Republican Valley? According to Exhibit 20 (p. 2170, opinion of Brewer,) it appears that the percentage of expenses to earnings for the O. & R. V. for the year 1891 was 120.26, whereas the expense account of the road was greater than its earnings, the logic of the opinion would be that it would be beyond the power of congress to regulate the interstate commerce business, if any, passing over that road.

This basis would defeat Interstate Com. Act;

First Objection to Figures Set Down in the Foregoing Table.

No Proof that the Reduction of Rates Would Reduce the Income, but the Proof is to the Contrary.

This Table was Computed and Framed to Deal Solely With the Question of Income.

How can the court assume that reduction of rates would reduce income?

In *Chicago etc., Railway Company vs. Wellman*, 143 U. S. 343, Mr. Justice BREWER said:

"Must it be declared as a matter of law that a reduction of rates necessarily diminishes income? May it not be possible, indeed does not all experience suggest the probility that a reduction of rates will increase the amount of business and therefore the earnings? At any rate must the court assume that it has no such effect, and ignoring all other considerations, hold as a matter of law that a reduction of rates necessarily diminishes the earnings?"

Can Court assume reduced rates would reduce net income.

INCREASE OF RATES MIGHT DIMINISH INCOME.—In the above case it is further said:

"There was in evidence the opinion of two gentlemen, doubtless well informed and worthy of credit, that an increase of freight rates was inexpedient and futile, and would tend to diminish rather than increase the income from freight."

The railway companies have not examined a single witness to show there would be actual loss of income by the enforcement of this law. Their side of this record is silent upon this subject. Yet they are before the court asking this court to adjudicate that the enforcement of this law would so seriously impair their income as to amount to an unlawful confiscation of their property.

Nothing in this record to show reduced rates would reduce income.

Upon the part of the appellants we not only have evidence upon this point, but we have the benefit of history. Mr. Dilworth testified: (pp. 1003-1004-1005).

"Q. Mr. Dilworth, have you observed, so as to be possessed of knowledge on the point whether or no the tonnage upon the roads is increased or diminished by the reduction of the rates, and if so, what has been the result of your knowledge and observation upon that point?

"A. There is no question—*I think it would not be disputed that a reduction of rates will increase the tonnage.*

Reduced rates will increase tonnage.

"Q. Have you observed such an effect upon any of the lines within the limit of the state of Nebraska?

"A. Yes, sir; we had one very forcibly brought to our attention in the last two months.

"Q. State what it was?

"A. That was the commodity of hay upon one of the lines of road in this state; they have quite an extensive country that has hay lands, and up to 1890 and 1891, in May, they had a rate put in there; and there had been only about 13,000 or 14,000 tons of hay shipped.

"Q. Name the road?

"A. The Fremont, Elkhorn & Missouri Valley railroad. In May, 1891, they reduced the rate on hay from points in this state on their line to the city of Omaha, the hay market.

Reduction of 50 per cent on hay as illustration.

"Q. State the rate of reduction.

"A. The reduction, I think, was *fifty per cent.*, from

twenty-five to fifty per cent., is my recollection of the rate, and the hay business increased from the 13,000 to 14,000 tons up to the present year, when it will amount to between 50,000 and 60,000 tons of hay.

"Q. *Then a reduction of twenty-five to fifty per cent. on the rate increased the tonnage some 500 per cent?*

"A. *400 per cent.; something like between 400 and 500 per cent., yes sir.*

"Q. Have you been familiar with the reduction of rates in the *state of Iowa* under the law passed by the legislature of that state?

"A. I do not know what reduction was made, but they made quite a low local rate in that state several years ago.

"Q. Are you familiar with the fact that such a reduction was made by the state of Iowa?

"A. Yes, sir.

"Q. Are you prepared to state what has been the effect upon the amount of tonnage upon roads since such reduction, as to whether the amount of local tonnage increased or diminished, and if increased, to about what extent?

rates increased earnings by reduced rates.

"A. I cannot tell what extent, but *it has increased there so that the roads have made net earnings on their Iowa business, more than they did previously.*

"Q. More than they did before the reduction of rates?

"A. *Yes, sir.*

"Q. *So that you understand that the railroads of Iowa have made more money since the reduction of rates than they did before?*

"A. *More net money, yes, sir.*

"Q. As an officer connected with the State Board of Transportation, and from your knowledge and observation upon that subject, what would you say would be the effect upon the railroads of the state of Nebraska by the enforcement of the law in controversy, as to whether or not it would increase or diminish the local tonnage?

"A. *I think it would increase the local tonnage.*

"Q. State whether or not such increase would be such that the railways would make as much money by the enforce-

ment of the rates as they make now by retaining the old rates?

"A. Well, history tells us that they probably would, and I believe that they would clean up as much money as they do now.

Reduced rates benefit shippers and roads.

"Q. Well, *the shipper would be benefited by the reduction of the rates and the railroad company not injured, but, rather, benefitted?*

"A. Yes; the local shippers."

It may be argued that this opinion of Mr. Dilworth is speculative and uncertain, but it seems to us not so. It is based upon actual experience and observation. It is based upon the experience of history. Railroad experience has already demonstrated the effect of the reduction of rates. The reduction of rates always multiplies the business.

Reduction of rates always increases the amount of traffic. The converse of the proposition is equally true, that higher tariffs always reduce the amount of traffic. That is a proposition that no railway traffic manager was ever heard to dispute. While, therefore, it stands as an admitted proposition that increase tariff rates diminish traffic, reduced tariff rates always increase traffic. The revenues of the railway companies are never, therefore, diminished unless the reduction in tariff rates should be so great as to be out of proportion to the increased amount of traffic.

High rates reduce traffic.

SECOND OBJECTION TO TABLE.

Of What Does the Estimate of Operating Expenses Consist that the Court Must Necessarily Deduct the Full Amount of Same?

In determining the amount of net profits reserved to the roads, arising from local freight business, there was deducted from the income a certain specified sum for expenses. The amount of such expenses was computed from the estimates. What *primarily* constituted the *expense account* is not made

clear from the evidence in the record; in other words, there is nothing in the record from which it can be clearly and certainly made to appear that the full amount of such estimated expense account was proper and just expense. A court of equity should not enjoin the enforcement of a law on account of such large expenses, unless it is made clearly and certainly to appear that such expenses were proper and necessary.

Are the expense accounts legitimate.

In *Chicago, etc., Railway Company vs. Wellman*, 143 U. S., 345, Mr. Justice BREWER said:

"A single suggestion in this direction: It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries, fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, *they should be fully advised as to what is done with the receipts and earnings of the company, for if so advised it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call "operating expenses."*

Such operating accounts can not be used to defeat power of legislation.

THIRD OBJECTION TO THE TABLE.

This Table was Partly Made up from Tables Marked Exhibtis 20 and 4, which Exhibits were but Estimates Made up by Mr. Dilworth from the Reports of the Railway Companies, but Which are Incorrect as Appears from the Testimony of the Railway Auditors.

Mr. Dilworth, as secretary of the State Board of Trans-

portation, had in his office reports from the respective railway companies from which he compiled these exhibits 20 and 4 (pp. 932-980.)

These reports of the railway companies did not include the whole amount of their local business. The railway companies in their reports did not include as local business the shipments of cattle from points within the state to South Omaha for the reason that such shippers had a reserved right to rebill the cattle to Chicago if not sold in South Omaha. The same practice prevailed as to grain and some other classes of shipments.

R. R. Co's omitted part of local business.

The auditors of the Union Pacific Railway Company and the Burlington & Missouri River Railway Company were called as witnesses and gave the actual receipts from local shipments, and the actual expenses of local shipments, and which vary materially from the table compiled by the Circuit Court.

WILLIAM RANDALL, freight and ticket auditor of the B. & M. railroad, testified for the railway companies, pp. 541, 542, that the earnings of the B. & M. company for 1892 upon local freight shipments were..... $1,853,036.59
Operating expenses, including taxes..... 972,183.70

Randall.

Leaving a net profit of..... $ 880,852.89
Amount of net profit set down in table..... 442,792.00

Difference between B. & M. profit and that in opinion of court.

It will thus be noted that the net earnings from the local business of the B. & M. railroad for 1892 was double the amount set down in the table compiled by the court.

Reducing this amount of net profit by 29½ per cent. (reduction called for by the law) and we still have a net profit on the B. & M. R. from local freight business of $620,991.17
as against amount set down in said table.. 77,617.00

It will also be noted that the gross receipts according to

Mr. Randall's statement, were nearly $650,000 more than the amount set down in said table.

Mr. Randall testified (p. 541) that he had made an examination of the books of accounts and records of the B. & M. railway company in order to prepare himself to testify in this case.

The witness had in front of him a memorandum taken from the books and records of the office, from which he testified, so that he could not very well have made a mistake in the amounts given.

On page 569 Mr. Randall explains how he reached the computation that the earnings from local business for 1892 were $1,853,036.59.

On page 562 he explains what he took as a basis for his computation to reach the item of expense account, $972,183.70.

On page 573 he further explains his manner of computation to reach the same result.

We speak of these facts to show that the witness Randall, could not well have been mistaken in giving the foregoing testimony.

It is true that afterward Mr. Randall was taken by the railway companies from Omaha, his residence, to Lincoln, Nebraska, without notice to, or the knowledge of John L. Webster, who had examined him in the first instance, and there modified his testimony, page 630, by stating that the figures given in his previous testimony were perfectly correct except the item of operating expenses which he said should be $1,221,742.84.

If this last item of expense was correct it would still leave net profit on local freight business of $631,293.75.

How Mr. Randall came to increase the expense account, and what additional items he may have included in the expense

account when he pretended to correct his testimony is not disclosed. For all we know it may have included new rolling stock purchased, and also some contracted for to be delivered in the future.

To prove that Mr. Randall was right in his first statement of expenses, and wrong in his corrected statement, let us look at the following figures:

The first statement:

Total receipts	$1,853,036.59
Expenses	972,183.70

Receipts 100 per cent greater than expenses.

It will be seen that the expense account was about one-half the receipts; or in other words that the receipts were about double the expenses.

Mr. Randall stated, p. 544, that the earnings on local freight business per ton per mile were 2.079 cents. The cost per ton per mile, (p. 543) 1.091 cents.

It will thus be seen there existed the same ratio of cost to receipts per ton per mile as in the sum totals above given. When in his corrected testimony he stated that all his previous figures were correct except the expense account, and increased the sum total of expense account to $1,221,742.84, it will be seen that he put his expense account out of all proportion to his previous figures and which total expense account could not be correct if his statement of earnings and expenses per ton per mile above given was correct, and which items he did not undertake to correct or modify.

JAMES G. TAYLOR, the auditor and assistant treasurer of the B. & M. railway testified: (p. 262).

The receipts from local freight busines were.	$1,853,036.59
Expenses	1,221,742.84
Leaving net profit	$ 631,293.75
As against the amount set down in said table	$ 442,792.00

Taylors figures.

How Mr. Taylor arrived at this expense account he do not disclose in any manner that is satisfactory.

Even granting that Mr. Taylor is right, it will be o served that the net profit on the B. & M. railroad on loc business is nearly $200,000 more than that put down in sa table; a sum large enough to yield a satisfactory profit.

00.00 more ofit than ted in opin- of court.

Union Pacific Earnings and Expenses on Loc Freight Business.

ANDREW S. VAN KURAN, the freight auditor of the Uni Pacific system, testified (pp. 617-618) that the freight ear ings within the state of Nebraska for the year ending Ju 30, 1893 were $4,313,204.46; expenses, including taxe $2,501,935.00.

If the witness intended the foregoing figures to represe the earnings and expenses on local freight business, it wou leave a net profit of $1,811,269.46.

We are inclined to think that the witness intended t above figures to represent the income on the Nebraska milea on through freight as well as local freight, because he stat (p. 618) that he does not have the figures showing the wh amount of business beginning and ending in the state of N braska, but adds (p. 618):

"I have not the figures as to that but it is about 15 p cent. of the earnings, which would give a rate per ton per m earned on strictly local freight in Nebraska of 1.984 cents, a cost of carriage of 1.135 cents per ton per mile."

ings of U. R. $248.718 ater than ted in opin-

Fifteen per cent. of the above earnings in Nebraska would be	$646,980.(
The amount set down in said table is	398,262.(
Actual earnings above what appears in said table is	$248,718.

We have not in the testimony the amount of receip

from local business on the subordinate and branch lines, but we apprehend that if the same had been given we would have found the same ratio of increase of receipts over the amount set down in said table that we have found in the Union Pacific case and in the Burlington & Missouri case; or, in other words, that the net profits resulting from the local freight business after the enforcement of the law would have yielded a handsome net profit to the railway companies. We think we have demonstrated that the table referred to is inaccurate in fact.

Results from a More Deta d Calculation.

The evidence shows that House Ro 33 reduced the rates 29 1-2 per cent. Mr. Randell, the auditor of the B. & M. railroad in Nebraska, on pp. 541-542 in answer to the question? "State what were the earnings of the company in 1892 upon freight shipped between points both of which, that is points of origin and destination, were within the state?" A..... ..... $1,853,036.59

To ascertain then what the earnings of the company would have been in 1892 had House Roll 33 been in force, we have but to divide the sum of..... $1,853,036.59
by 1, 29½. The proposition being the same as the statement of a gross sum of principal and interest with the rate of interest given to find the principal.

The $1,853,036.59 divided by 1,295 would give..... .... $1,430,916.99

This sum would be the gross receipts of 1892 had House Roll 33 been in force.

Now the cost of handling this freight would be the same under the one instance as the other.

On page 630 the same witness is shown to have been recalled and states: "I have verified

my former figures by personal examination since.

The figures I gave before are perfectly correct, except operating expenses that should be... 1,221,742.84

The gross earnings had House Roll 33 been in force would have been as we have seen.... $1,430,916.99

From this deduct the gross expense..... $1,221,742.84

This would give the net earnings..... $ 209,174.15 on freight shipped from points within Nebraska to other points within the state of Nebraska.

Mr. Van Kuran on page 617 says: "I am auditor for the receivers of the Union Pacific system. I have been freight auditor for seven years past, and have been connected with the auditing department for twenty-two years. I have made an examination of the affairs of the company involved in this controversy." On pages 617, 618 the witness was asked the question: "What were the freight earnings of the Union Pacific Railway Company upon the Omaha and Ogden line within the state of Nebraska for the year ending June 30th, 1893?" A.... $4,313,204.46

He was then asked the question: "What were the freight operating expenses inclusive of taxes?" A..... $2,501,935.00

This latter sum would be the same had House Roll 33 been in force for the year ending June 30, 1893.

On page 618 the same witness was asked the question: "What per cent. of the whole business was business beginning and ending in the state of Nebraska?

A. "I have not the figures as to that, but it is about 15 per cent.

House Roll 33 would only operate upon the

gross earnings on freight shipped from points in Nebraska to points in Nebraska or upon 15 per cent. of $4,313,204.46
because House Roll 33 only operates upon freights beginning and ending in the state of Nebraska. This, then, would leave the gross earnings on the other 85 per cent. just the same as though House Roll 33 had never been passed.

To ascertain the 15 per cent of this..... $4,313,204.46
we have to divide this sum by 115; this would make..... $3,750,608.22
The difference between this sum of..... $4,313,204.46
and the..... $3,750,608.22
would be the 15 per cent., or..... $ 562,596.24

This sum, then, of $562,596.24 is the amount upon which House Roll 33 would operate. The amount of $562,296.24 would be 1.295 per cent. of what it would have been had House Roll 33 been in force during that year. This would give us the sum of .... $ 419,906.25
as the gross earnings upon freight shipped from points in Nebraska to points in Nebraska.

Deduct from..... $ 562,596.24
the amount of..... $ 419,906.25
would give us the decrease on gross earning on freights purely local of..... $ 142,688.99

This amount of $142,688.99 taken from this $4,313,204.46
would leave..... $4,170,515.45

This sum of $4,170,515.45 would, then, be the gross earnings upon this line of road on freights within the state of Nebraska had House Roll 33 operated on purely local freights from June 30th, 1892, to June 30th, 1893.

From this amount of..... $4,170,515.45
deduct the total operating expenses, including taxes..... $2,501,935.00
would leave as net earnings on freight

within the state of Nebraska for the year ending June 30th, 1893..... $1,688,580.45

It will be noticed from the evidence of Mr. Randall that he only gives the total gross receipts and total operating expenses upon freights shipped from points of origin and of destination within the state of Nebraska. He does not give either the gross receipts or gross operating expenses on other freights within the state of Nebraska, he states the relative amount of the same to be 21.27 per cent. (p. 573.)

If $1,853,036.59 be .2127 per cent. then 100 per cent..... $8,716.674.20

If it costs the C. B. & Q. $1,221,742.84
to earn $1,853,036.59
then to earn $1.00 it would cost .65984 or .66 cents.

The net earnings then would be 34 cents on each dollar earned.

34 per cent. of the $8,716,674.20 would be. $2,963,669.23

Then to sum up the evidence of these two auditors, we would have the net earning of the C. B. & Q. on freight shipped from points in Nebraska to other points in this state ..... $ 209,174.15

And net earnings on other freights in Nebraska..... $2,963,669.23

Total on all Nebraska freights had House roll 33 been in force from June 30th, 1892, to June 30th, 1893..... $3,172,842.38

U. P. gross earnings, had House roll 33 been in force from June 30th, 1892 to June 30th, 1893, would be..... $4,170,515.45

Total operating expenses during same time including taxes..... $2,501,935.00

If it cost the U. P..... $2,501,935.00
to earn $4,170,515.45
then it would cost 54 cents to earn $1.00 and 46 would be a net profit.

The net earnings we have seen under House roll 33 would be..... $1,688,580.45

This would make the net earnings on the 1023 miles of U. P. road in Nebraska 5 per cent. on a cost of $33,000 per mile, not including through freight nor any of its passenger business.

A net earning on the 2515 miles of the C. B. & Q. in Nebraska of 5 per cent. at cost of $25,231.00 per mile exclusive of through freight or passenger traffic.

FOURTH OBJECTION TO SAID TABLE.

These Cases Being Bills in Equity to Enjoin the Enforcement of a State Law, is it not the Duty of the Court to Take, as of the First Importance, the Admissions and Confessions of the Railway Auditors Made Against the Interest of the Railway Companies, as a Basis of Computation, Rather Than Tables which are but Estimates, and which are Proven to be Incorrect by the Testimony of the Railway Auditors?

Should take admissions of R R. Co's a basis of computation.

The principle of equity should be that the railway companies are not entitled to have the law declared invalid and its enforcement enjoined unless the rates are destructive to railway property. In such a case it is not the duty of the chancellor to refuse the injunction unless the case is made out by clear and decisive evidence. It might have been proper to have acted upon the tables prepared by Mr. Dilworth as estimates if such tables had been the only evidence in the case

touching the receipts from local business and the expense relating thereto; but whereas the railway companies are before the court, and their auditors, who are supposed to know more about these facts than all other persons, and who have facilities to know the absolute truth about these facts, state that the profits from local freight business are so much greater than the amounts set down in Dilworth's exhibits, it is the duty of the Chancellor, as it seems to us, to take these confessions and admissions of the railway auditors as the basis of computation.

ey show large profits.

Whereas such a basis for compiling a table will show large resulting profits to the railway companies from local freight business, the injunctions should have been denied.

FIFTH OBJECTION TO TABLE--PROFITS ARISING FROM LOCAL BUSINESS.

The Railroads in the State of Nebraska Derive a Profit from Their Local Tonnage of Nearly 100 per cent. Over and Above Operating Expenses.

per cent profit o local busi- ess.

If said table had been compiled from the facts testified to by the auditors of the railway companies it would have shown a profit of nearly 100 per cent. on local freight business.

The disclosures which have been made in this case many times, inadvertently perhaps, have brought out the startling information that the profit upon the local business in the state of Nebraska exceeded the cost of transportation by about 100 per cent. There are so many evidences of this fact through this record that we mean to select but a portion of them.

Mr. William Randall, freight and ticket auditor of the B. & M. road in Nebraska, and the first witness called by the complainants upon the subject of the earning from local business, as compared to the cost of transportation, stated that the local freight earnings of the B. & M. company for the

year 1892 were $1,853,036.59, and that the operating expenses, including taxes, $972,183.70. (pp. 541, 542.)

"Q. State what were the earnings of the company in that year upon freight shipped between points, both of which, that is, points of origin and points of destination, were within this state?

"A. $1,853,036.59.

"Q. What were the operating expenses on this business?

"A. Operating alone.

Randall admits profit of 100 per cent.

"Q. Yes; just the operating expenses, including taxes?

"A. $972,183.70."

It will be seen from this statement of Mr. Randall that here was a clear profit over operating expenses, including taxes, of nearly one hundred per cent. on the local business of the Burlington company in 1892.

This fact is demonstrated by the testimony of Mr. Randall from another point of view. (p. 543).

"Q. What was the cost per ton per mile to the railway company for transportation on Nebraska business, that is business beginning and ending in this state?

"A. The cost per ton per mile, the average cost is the only thing we can get at. We cannot give the actual cost. The average cost is 1.091 cents.

"Q. What were the earnings in 1892 per ton per mile?

"A. 2.079 cents still in Nebraska."

It thus will be observed by computing the profits on the basis of the cost of transportation per ton per mile, that there is a clear profit of nearly one hundred per cent. on local freight business.

Mr. James G. Taylor, auditor and assistant treasurer of the B. & M. in Nebraska furnished a table Exhibit "7," page 593, from which some interesting facts are ascertained.

At the bottom of the table is the following:

Average cost per ton per mile, including taxes:

Road west of Missouri River.....	939 cents
Within the State of Nebraska.....	879 "
Nebraska proper (local business)...	1.370 "

On the upper half of the table Mr. Taylor states the earnings as follows:

Average rate per ton per mile earned:

Road west of Missouri River.... ..	1.340 cents
Within the State of Nebraska.....	1.332 "
Nebraska proper.....	2.079 "

Taylor admits profit to be nearly 100 per cent.

It will be observed from a comparison of the above figures that the earnings of the Burlington company on all their system west of the Missouri river as well as upon the local business in the state of Nebraska is nearly one hundred per cent. over and above the cost of transportation, including taxes.

It may be observed that Mr. Taylor puts the cost of local business something higher per ton than does Mr. Randall. As Mr. Randall, however, is the auditor of freight accounts instead of being the general auditor of the company, the probabilities are that he is more nearly correct, his business being confined more particularly to the subject matter now under inquiry.

Another fact appears from this table of Mr. Taylor which leads to the same result. The total freight earnings on the B. & M. road west of the Missouri river he places at $8,711,972.69. In the first items of his expense account he has included all expense of the company for all its business, including passenger business. A little later down in the account he undertakes to separate the expense of the freight from the passenger business by assigning a percentage to freight, by which he puts the expense of the freight business at $4,570,680.30. It will thus be seen that the freight earnings as a

Earnings $8,711,972; expenses $4,570,680; profit $4,141,282.

entirety are about double the expense of the freight business, or in other words, its earnings upon freight business are about *one hundred per cent.* more than the cost of transportation. It also appears from the testimony of Mr. Taylor that the revenues of the B. & M. railroad per mile are greater in the state of Nebraska than they are in the other states through which its system extends west of the Missouri river. On page 591 he states:

"A. The average rate per ton per mile earned on the roads west of the Missouri river is 1-340 cents. In Nebraska proper the amount earned, originating and terminating in the state, is 2.070 cents."

B. & M. R. ings gre Neb. other

It thus appears from the foregoing answer that the freight earnings on local business in the state of Nebraska are nearly one hundred per cent. greater than the earnings on the system west of the Missouri river. *That is to say that the profit to the company on its local business in the state of Nebraska is much greater than the profits on its general business, including interstate as well as local business.* From the foregoing answer of Mr. Taylor as well as from an examination of his exhibit number "7" it is evident that the income on the local business of the company per mile is *fifty per cent.* more than the income on its general business, and that the *income on its local freight business is about one hundred per cent more than on its operating expenses.* The conclusion is evident that the present local rates are such as to insure to the company a higher rate of profit than is earned from the general business of the company.

Profits busin than ness.

The local rates charged by the Burlington roads on its lines in Nebraska are such as to enable it to earn a much larger profit than it earns on its general system west of the Missouri river, which lines penetrate Dakota, Wyoming, Colorado and Kansas. That was made to appear from his cross-examination. (p. 607).

"Q. *The rates earned on the lines in Nebraska is 2.079 cents?*

lor. "A. *The average rate per ton per mile earned is 2.079 cents.*

"Q. *And on your sytem west of the river it is 1.340 cents?*

"A. *Yes, sir.*

"Q. *Will you explain to me how your rate on earnings comes to be so much larger in this state than it is on your system as an entirety?*

"A. *That I cannot tell.*

While Mr. Taylor cannot explain how it comes that the earnings in Nebraska are greater than they are elsewhere on its lines, the solution, however, is found in this record. *It is because the company is permitted to charge local rates in the state of Nebraska 40 and 50 per cent. higher than the company charges in the state of Iowa, and some 40 per cent. higher than they are permitted to charge in Wisconsin, Minnesota, Dakota and Kansas.*

n Kuran Andrew S. Van Kuran, who has been the freight auditor of the Union Pacific system for seven years past, testified (p. 617-618.

"Q. What were the freight earnings of the Union Pacific Railway Company upon the Omaha and Ogden line within the state of Nebraska for the year ending June 30th, 1893?

P. R. 100 per ent profit. "A. $4,313,204.46. * * *

"Q. What were the freight operating expenses, exclusive of taxes?

"A. $2,344,975.00.

It will thus be seen from the above answers that the freight earnings of the Union Pacific within the state of Nebraska were about one hundred per cent. more than the operating expenses, or a net profit of about one hundred per cent. Mr. Van Kuran puts this in another way (p. 618.)

"Q. What were the freight earnings per ton per mile?
"A. 9.03 mills.

"Q. What is the cost per ton per mile, exclusive of taxes?
"A. 4-9 mills."

100 per cent on ton per

Of course Mr. Van Kuran, in the above answers, is not speaking of the income from local business, but is stating the earnings as well as the cost of its general freight business. But he puts the earnings of the company on its freight business to be about one hundred per cent net profit. On cross-examination he states the matter in this way (p. 621.)

"Q. You say that the earnings per ton per mile for the shipment of freight is 9-3 mills. By what method do you arrive at that?

"A. We find the tons moved first, the entire tonnage, and then the tonnage moved one mile and divide the earnings by that.

"Q. *If the earnings per ton per mile are 9.3 mills, what are the operating expenses per ton per mile?*

"A. *That is including taxes, 4.9 mills.*"

According to the last above statement there is a profit of about 100 per cent. over operating expenses. Only 15 per cent. of the business done by the Union Pacific company in Nebraska is local business. Thus 85 per cent. of its entire business is inter-state business. So the result is arrived at that the profit of the Union Pacific on its interstate business in the State of Nebraska is nearly 100 per cent. The profit on its local business is much larger. He states (p. 618) that about 15 per cent. of its freight business begins and ends in the State of Nebraska and that the earnings on strictly local freight in Nebraska are 1.984 cents. The astonishing result is reached that the *earnings per ton per mile on the local business of the Union Pacific* in the state of Nebraska *are nearly five times as much as the average cost of hauling a ton a mile.* Of course I make the above comparison upon the average cost of transportation of freight, including interstate business.

In the face of such enormous profits arising from the local freight business in the state of Nebraska, what right have the railway companies to be heard to complain of the Maximum Freight Law, which reduces the local tariff rates only 29½ per cent. It is now the accepted law of this country that the state legislatures have a right to establish such maximum rates as will allow some profit, however small. A reduction of 29½ per cent. upon the local rates would still leave an enormous net profit to the railway companies, a larger profit than can be realized from any other kind or class of business in this western country, a net profit of 70½ per cent.

After reducing 29½ per cent profit remains 70½ per cent.

The Annual Profits of the General Business of the Union Pacific Company Have Been Nearly One Hundred per cent. Over Operating Expenses.

Pattison committee says: (p. 1195).

"In 1880 the Union Pacific railway, as a whole, aided and unaided, was earning about thirty per cent. of its cost of reproduction, and in 1886 its net earnings were nineteen per cent."

Again (p. 1156) in speaking of the earnings for the years 1880, 1881, 1882 and 1883 :

"The gross receipts for these four years were	$89,273,322.32
The operating expenses for the same period...	$43,438,335.89
Leaving as net earnings.....	$45,834,986.43

Again on page 835 :

"From the first of January, 1884, to the first of January, 1887, the gross earnings of the Union Pacific have been.....	$53,232,134.31
The operating expenses.....	$28,433,866.45

These statements show the earnings were, during all these years, nearly double the operating expenses, or nearly one hundred per cent. net profit. This ratio of net profit con

tinued until that company began wasting surplus earnings in bad investments and useless branches, hereinafter more particularly shown.

The amount of profits earned by the B. & M. were so great and its dividends so large that it issued dividend stock to absorb its surplus earnings in that way, as we will show when we come to speak of its capitalization.

The Cost of Local Business is but Little Greater than the Cost of Interstate Business.

There is a great diversity of opinion among the witnesses as to the difference in cost between the local and through business. There is as much difference upon this point between the complainants' witnesses as there is between certain of the complainants' witnesses and the defendant's witnesses.

Cost of local business.

Mr. Utt claimed that there was a marked difference between local and through shipments contending that local shipments were much more expensive to the companies.

Mr. Randall, also examined for the complainant on that point, discloses that there is practically no difference in cost to the railway companies (pp. 546-547):

Q. "Well, I wish you would explain the matter of doing local and interstate business with reference to carriage, cost, earnings and employes?

"A. Practically there is no difference; it is all done on the same plan. A consignment of merchandise going from Omaha to Hastings, Nebraska, is treated identically the same as a consignment going to San Francisco; that is, it passes through the freight house, it is handled there side by side with the local business, the Hastings consignment and the San Francisco consignment are handled side by side, probably even upon the same truck, and carried out on the platform on the same truck; the chances are it is put into the same train. When the train gets along to Ashland Nebraska, a consignment from there to San Francisco might possibly be put into

the same car with the consignment from Hastings. If it is a carload the same argument applies. The car has got to be switched to a place to be loaded, no matter whether it is going to Lincoln, Nebraska, or to San Francisco; the switch engineer and crew know no difference and the yard men know no difference. It cost them as much time and as much labor to set out a car to be loaded for Lincoln as for San Francisco. When that car is ready to go it costs as much to put that car into the train, whether bound for Lincoln or for San Francisco—just the same; there is no difference. Then, with regard to time, as a general thing local and through freight are carried on the same trains; the only exception to that is when we have enough through business to make up a through train. When we do, of course we take advantage of that and send the train through; when we do not, as is generally the case, we have got to send them in the same train, and for strictly local business; for instance, picking up business going west for the Pacific coast, of business going east for Chicago, or points east of that, at these local stations consignments for Omaha and Chicago would probably be put in identically the same car, side by side, and carried to the Missouri river side by side, because we could not possibly get a carload at each place; therefore we have got to carry them in the same car until we get to a distributing point or collecting point, so that we can make through carloads of them. But within the state of Nebraska local business and through business are done under identically the same conditions AND AT THE SAME EXPENSE. Now, then, with reference to the time: It takes a great deal longer time to do local business than it takes to do through business on the road, because a local train, as I previously explained, has got to stop every eight or ten miles; it has got to switch to set out its cars, either for loading or unloading, and has to run its way freight cars to the platform, so that the warehouse freight can be unloaded into the warehouse, whereas there is no such work entailed on the through business."

Mr. W. A. Dilworth testified that there was no way of determining accurately the difference in the cost between local and through business, but estimates the additional cost to be from 10 to 20 per cent. Nevertheless, taking these matters into account, there is no justification in law or in reason for the railway companies insisting that the Maximum Freight

Law would operate as a confiscation of the properties of the companies, when the earnings on local traffic are so enormous as heretofore shown.

SIXTH OBJECTION TO THE TABLE.

The Table is Compiled Upon the Theory that the Reasonableness of the Rates Fixed by the Act is to be Determined by the Fact Whether or no the Enforcement of Such Rates Would Leave a Reasonable Net Profit from the Local Business Affected Thereby.

Our Contention is that We have a Right to Take into Consideration— What take account?

a. The Whole Business of the Company. Whole busi

b. Whether the Rates Fixed in the Act are as High as the Articles Composing the Local Tonnage Can Reasonably Bear, Leaving a Margin to the Producer and Shipper, and not Producing an Exorbitant Price to the Consumer. Margin to duct.

c. That a Rate which, as to profits, Would be Deemed a Reasonable Rate Upon a Line Running Direct From Point of Shipment to Point of Destination Must be Deemed a Judicial Reasonable Rate, Although Such Rate Might not Yield a Profit Upon Other Competing Roads Following Circutious Lines or Running Through Sparsely Settled Territory. Distance. Circuitous

The whole business of the company should be considered:

1. A *railway line is an entirety.*

The income from a railway goes into a common fund.

Its expense account is paid out from a common fund.

Its capitalization is upon its entire line.

R. must be treated as an entirety.

In railway accounts there is no distinction between local freight business and interstate freight business.

When a railway company wants to ascertain the earning per mile from its freight business it makes a computation by dividing the total receipts by the mileage.

If a railway company wants to ascertain the receipts from local business it does so by taking a percentage of the total freight business, which is illustrated by the testimony of Van Kuran, Taylor and Randall, heretofore cited.

ndall. Local business 1.27 per cent of whole.

For instance, Mr. Randall, for the purpose of qualifying himself to testify in this case stated that he was obliged to have an examination made of the local waybills (p. 551), and that he estimated the local business to be 21.27 per cent. of the whole freight business.

To get the receipts from local business for 1892 he took 21.27 per cent. of the entire freight business. (p. 573.)

an Kuran. per cent.

Mr. Van Kuran testified, (p 618), that he had no data upon which to give the receipts from local freight business otherwise than that it composed about 15 per cent. of the total freight earnings and hence it was computed on a percentage.

The same is true as to the expense accounts.

The same train that carried through freight may carry local freight.

There is no way of estimating the cost except by percentages.

In the accounts of the company the expense account of operating a line of road is kept in bulk.

Taxes paid are items upon the line, and can only be apportioned to local business by a percentage of calculation.

So with the expense account as applied to passenger business and freight business. It is fixed on a percentage, the

usual estimate being about 30 per cent. to passengers and 70 per cent. to freight business.

2. *These suits* are brought by stockholders of the companies, *not by stockholders of divisible parts of the companies*, nor by stockholders interested in divisible portions of the income of the companies.

3. Fixing rates is a matter of governmental regulation.

This is so whether the regulation is by one state or by a number of states, or by the general government acting through congress.

It may be the policy of governmental regulation, whether by the state or nation, or by all of the states collectively, through which a line runs, and of congress, to allow higher rates for one class of business than for another, so as to allow the companies a general net profit upon their entire business, and yet to reduce the rates on a particular line of business having regard to the welfare of the people.

Rates not fi
on basis t
each artic
shall yield
profit.

Such has been the policy of the railways in establishing rates, as testified to by Utt, and by Fink, and as set down in the opinion of Brewer, Circuit Justice, (opinion pp. 2164, 2165).

It is on that policy that sugar is carried from San Francisco to Chicago to come in competition with Nebraska sugar, or with sugar from Cuba or the south. These are matters of common knowledge.

So here the legislature may have had in mind the same principle, as it only undertook to fix maximum rates for local freight business.

The act does not concern itself with passenger rates.

If the governmental regulation of a railroad be such as allow it to earn a large profit on its passenger business, or on its

through business, has the railway company a right to complain if the rates by law are correspondingly reduced upon local freight business?

The question put in another form is this: the local Nebraska rates are 40 per cent. higher that the local rates in the state of Iowa. See Dilworth's testimony, p. 701, see also pp. 33–34, *supra.*

This discrepency of rates is one of long standing and illustrates the point that it does not follow, because one state reduces freight rates that every other state will immediately make the like reduction.

Neither does it follow, because a state reduces local rates, that Congress or the Interstate Commerce Commission will make a like reduction on interstate business.

Such an event may happen. "*Sufficient unto the day is the evil thereof.*"

4. We have seen by a previous statement in this brief, that the percentage of reduction upon the total amount of business done by the B. & M. Company in Nebraska would be 4.2 per cent. and upon the business of the Union Pacific Railroad Company in Nebraska 2 per cent.

Reductions on whole income of C. B. & Q. 1.3-10 per cent.

It elsewhere appears in the testimony of Mr. Dilworth, (p. 933), that the reduction upon the whole business of the Chicago, Burlington & Quincy Company would be 1 3-10 per cent., upon the Chicago & Northwestern 3-10 of 1 per cent., and still less upon the Union Pacific.

C. & N. W. 3-10 per cent.

It *later on appears that on a valuation of $20,000 per mile, the annual earnings of the Union Pacific Railway Company is 26 per cent. and B. & M. Railroad in Nebraska 37 per cent.* (Ex. 22, p. 1,040.)

Exhibit 22, profit on value of $20,000 per mile.

5. It is for this that we take into consideration the general state of commercial business, the depression or prosperity of railroad properties, etc.

6. If we are to look to profits from local business

alone in determining whether these rates are reasonable or unreasonable, then we are logically carried a step further, to the point that on each specific *mile* of road the net earnings must be sufficient to pay more than the cost of transportation, and on each specific *article* the rate shall be one that will allow a net profit over and above the cost of transportation.

As well say a mile and an article a profit.

There is no possible way of determining the actual cost of carrying one ton of freight from one station to another, a distance of five miles. You can approximate the entire receipts from local freight earnings, and you can by calculation ascertain the earnings per ton per mile, and by like calculation ascertain the cost per ton per mile, but that is only when these percentages are applied to the local freight business as an entirety.

Yet, logically, if it is in every instance a question of net profit over and above the cost of transportation, the rate would have to be fixed so that on each and every article, regardless of weight, the rate should be one that would leave a net profit over and above the cost of transportation.

According to the testimony of Mr. Fink there is no railway freight agent in the United States wise enough to fix any such rate.

We also know that some portions of the mileage of a road are much more expensive to construct, and more expensive to maintain, and more expensive to operate, than other mileage upon the same line of road and within the borders of the same state. It would be impracticable to make a rate which would be higher over the more expensive part of the road and lower over the less expensive parts of the road. No such thing is recognized by railway men in the establishment of railway rates, as testified to by Mr. Fink.

R. R. make distinction tween lines account of of construct 15 U. S. 649.

7. Railway companies from time to time, of their own accord, have fixed classifications of freight, and for different

st of transporting articles not criterion.

classifications have established different rates. In such classifications and rates there has been taken into account weight and bulk as well as the value of the article. It has never been the policy to establish a rate which should have relation only to the cost of transporation of each specific article.

If railway experts have seen the impracticability of fixing a rate which would have sole reference to the cost of transporting an article, how is it expected that either the legislature or the judicial tribunal should fix a rate which would only have reference to the cost of transporting the specific article, or how could the court judicially determine that a rate was unreasonable which was not fixed solely with reference to the cost of transportation?

What is true as to an individual ton of freight must be true in some sense with reference to the local tonnage as an entirity.

Logically, therefore, you cannot rest the case upon the single proposition that the rate must yield a net profit upon the local business abstractly considered.

RATE SHOULD LEAVE MARGIN TO THE PRODUCER AND SHIPPER AND NOT PRODUCE AN EXORBITANT COST TO THE CONSUMER.

ce exorbitant hat does not leave margin to producer.

In fixing a reasonable rate we should have regard not only to the weight of the article, but to the value of the article and the cost of its production, so that there will be left a margin to the producer without making the price exorbitant to the consumer.

1. Railways are governmental agencies for the transportation of commerce.

The primary object in granting charters to railway companies is to furnish facilities for the transportation of articles from the producer to the consumer.

It is of the first importance, therefore, that rates shall be so fixed as to leave a profit to the producer.

2. A rate would be unreasonably high which simply paid the cost of transportation of certain articles from the place of production to the market, providing such rate would not leave a margin to the producer.

The result is that railway companies carry many articles at what is called a reduced rate, in order to get the article into market, and make up the loss by charging a higher rate upon some other article.

This is the first step in making a classification, as well as in making a table of rates.

3. The legislature acted upon the same theory in the classification and table of rates in the Nebraska law.

ILLUSTRATIONS: The producer cannot afford to pay the same rate per ton per mile on corn as on wheat.

Groceries being valuable articles, will bear a greater rate per ton per mile than lumber.

The valuable ores and silver bullion will stand a greater rate per ton per mile than stone or brick.

Other illustrations might be given to the point that it is not a safe rule to undertake to fix rates solely on the basis of yielding a profit beyond the cost of transportation.

4. Classifications of articles are so arranged on different articles that those of greater value are charged a higher rate for transportation, probably because of the fact that transportation cost enters so little into the cost of the article; while in others the value of the article to be transported is so small that the cost of transportation is the larger item of its value. On such commodities the rate is placed at a very low figure. On the former the rate is high, because very little felt, and adds very little to the cost, proportionately.

DIRECT LINES AND CIRCUITOUS LINES. It will not do to Direct and cultous lines

judicially declare a rate unreasonable because it will not yield a net profit on circuitous or branch lines.

1. We heretofore have used as an illustration the B. & M. line from Omaha to Lincoln, and the Omaha & Republican Valley line from Omaha to Lincoln, the one being twice the length of the other.

& R. V. Ry. Co.

2. The Omaha & Republican Valley syetem is a road made up of five or six separate branch lines, and which were built as spurs or branches from the main line of the Union Pacific in different directions therefrom to tap new territory.

The local business of these several sub-branches is grouped together under one head, as if they constituted one connected line of road. As a matter of fact the branches operated under the name of the Omaha & Republican Valley which are north of the main line of the Union Pacific have no connection whatever with the lines which are south of the Union Pacific. There is therefore no continuous transportation over these branch lines of the Omaha & Republican Valley system. The local freight gathered on these branches of the Omaha & Republican Valley after being transported 50 or 100 miles, is turned over to the main line of the Union Pacific, so that the profits, or earnings of that shipment appear in the accounts of the Union Pacific, except a nominal part of the short mileage of the branch line.

A glance at the map will show that these branches under the Omaha & Republican Valley system run in circuitous and zig-zag courses, being designed to reach the towns in various counties, with a view only to draw the business from those towns to the main line of the Union Pacific.

3. The Fremont and Elkhorn road was constructed through the northwestern part of the state, where there were no towns, and no farmers, the country being used only for cattle ranches. The aim of the company was to extend the

R.

line into the mining regions of Dakota, so as to have the benefit of the through transportation from Dakota to the Missouri river, and over the Northwestern system to Chicago. The result was that the Chicago & Northwestern system, the principal defendant in one of these cases, is deriving a large profit from the operation of that line, while if the line was dependent solely upon its local business it would meet with an annual deficit.

4. Can it be said that because there are but few producers on the Fremont, Elkhorn & Missouri Valley line that those few producers should be required to pay a rate high enough so that the limited local business of the company should yield a net profit above the cost of transportation? Certainly not.

If this were true the legislature would have to establish a different local rate for every different line of road in the state, and would furthermore have to sub-divide the state into districts, and fix different rates for the different districts.

Such a practice would make a reasonable rate dependent upon whether the road was a straight line from point of shipment to point of destination, or whether it was a circuitous line, or whether it was in a thickly populated district as compared to a sparsely settled district, or whether it ran between city and city, or whether it ran between distant points in the country districts.

5. Take another illustration. The local rates between Omaha and Lincoln on the B. & M. yield a profit. The Chicago Rock Island & Pacific operates a line between the same points without any complaint as to those rates. Suppose two more lines should be built between Omaha and Lincoln, so as to sub-divide the present amount of local freight between four companies, and which would thereby reduce the net income of the present companies one-half. Could that be

C. R. I. & P. v. Lincoln.

ilding new lines reduces income on old lines.

used as an argument for increasing the local rate to double the present existing rates? Certainly not.

st rates be herefore increased.

These, with many other illustrations which will occur to the court, are only urged for the purpose of showing that the theory of computation as set down in the table in the opinion of the Circuit Court is not a safe criterion for determining the reasonableness of rates.

The Annual Net Earnings of the Principal Railroads in Nebraska Exceed Twenty-five per Cent. on Their Value, or Equals a Sum of Money Which Within Four Years Would Pay the Cost of Reproducing the Roads.

AVERAGE VALUE OF ROADS WILL NOT EXCEED $20,000 PER MILE.

There is sufficient testimony in this record to justify the conclusion that the average cost of reproduction or value of the roads in the state of Nebraska does not exceed $20,000 per mile, including right of way, railway tracks, equipment, station houses, telegraph lines and terminal properties. *On such a valuation the B. & M. railroad in Nebraska, in the year 1892, made a net earning of over 37 per cent., and the Union Pacific Railway company made a net earning of over 26 per cent.* (Ex. 22, p. 1040.)

valuation of $20,000 per mile, B. & M. ns profit of per cent, U. R. 26 per cent.

J. E. House has been a railroad engineer for more than thirty years, and during that time has been a resident of the state of Nebraska. He first began his work as an engineer in 1853, for the Rock Island road, in the state of Illinois, from Peoria to Bureau Valley Junction. He was next engaged in railroad work in the state of Iowa for the Mississippi & Missouri River Railroad company between Davenport and Council

E. House.

Bluffs. From 1855 to 1856 he was engaged in the construction of a road between Davenport and Iowa City, and from 1858 to 1859 was engaged in the western part of Iowa, with headquarters at Council Bluffs. While he was employed by the last named company he constructed a line fifty-five miles in length from Davenport to Iowa City, and surveyed a route across the state of Iowa from 325 miles to 350 in length. He was a second assistant in the construction of a road between Cedar river and Iowa City, in which he had personal charge of the excavation, bridging and the laying of track, and became familiar with the cost of excavation and the cost of material, and also in a general way became familiar with the value of iron used in construction. In 1862 he went into the employ of the Union Pacific company and continued with that company from the fall of 1863 until November, 1869, and which period covered the construction of the entire main line of the Union Pacific road (pp. 787-790). During his connection with the Union Pacific company he acquired an actual knowledge of the grading and bridging and became familiar with the cost of iron and other material that went into the construction of the road. Later on he became chief engineer in the construction of the Omaha and Northwestern railroad, which line at present forms a part of the St. Paul, Minneapolis & Omaha line, and a part of the Chicago & Northwestern system. He next had charge of the construction of the Missouri Pacific road in the state of Nebraska, extending to Atchison, in the state of Kansas, 147 miles in length. As chief engineer of this line he had full charge of its construction in Kansas and Nebraska (pp. 792-794.) Mr. J. E. House attached to his testimony an exhibit showing the actual cost of construction of the Missouri Pacific road, in which he puts the cost of construction of a single mile at $16,854.60; the total cost of constructing 147.53 miles of main line in 9.5 siding, $2,486,559.82 (pp. 831-832.)

With U. P. from 1862 to 1869.

Mo. P. R. cost $16,854.60 per mile.

We desire to note in passing that the Missouri Pacific lin in Nebraska was built through the most rugged part of the state extending north and south through the hilly region within few miles west of the Missouri river, so that the cost of con struction of the Missouri Pacific was greater than that of con structing a road along the river valleys or across the prairi lands of the state. Mr. House further stated that he deeme himself qualified from personal knowledge and information t determine the cost of the construction of a line of road withi Nebraska, including cost of equipment (p. 833), and he pre pared a table showing in detail the cost of construction an equipment of one hundred miles of road within the state of Ne braska, and which table is found at pages 834 and 835. Th summary of that table is as follows:

onstruct and uip one mile Nebraska 160.00.

Right of way, construction, terminals, station houses, iron, etc., per mile	$ 11,831.84
Equipment per mile, including buildings, machinery, round houses, shops, offices, etc.	6,328.16
Total cost one mile	$ 18,160.00
Total cost of 100 miles	1,816,000.00

"Q. Now, Mr. House, according to that estimate there do you mean to say that in your opinion the main line of the *Union Pacific* through Nebraska could be reproduced or duplicated for the sum of $18,160.00 per mile?

"A. *I think it could.* (p. 837.)

"Q. What would you say as to the line of the *B. & M. in Nebraska.* Could that likewise be duplicated or reproduced for the same sum of money per mile?

icate defen- nt roads for 160.00 per

"A. *I think so.*

"Q. And would that apply to the other lines of railway extending through the state of Nebraska, to-wit: the *Rock Island*, the *Fremont & Elkhorn*, and the *Northwestern* line through Fremont down towards Lincoln?

"A. *I expect so; yes, sir.*

"Q. And likewise including the Omaha & Republican Valley?

"A. I think *all the lines* in the state can be built for that price. The estimate I have made is based on the topography of country that is much rougher than that; that is, from the Missouri Pacific.

"Q. By that you mean the lines of the Missouri Pacific go over a more rugged country than that through which the other lines of railway through the state generally pass?

"A. Yes, sir." (pp. 837–838.)

LESTER A. WAKEFIELD resides in Sioux City, Iowa, and is a railroad engineer by profession. In 1871 he began work for the Chicago, Burlington & Quincy in building a line in Illinois from La Harpe. He was next with the Chicago, Clinton & Dubuque in building a railroad from Clinton to Dubuque along the Mississippi river. He was next connected with the St. Paul & Pacific, now forming a part of the Great Northern. He was next with the old St. Paul & Sioux City road, now forming a part of the St. Paul, Minneapolis & Omaha line. He was next with the Fremont, Elkhorn & Missouri Valley company, and later was employed as consulting engineer for the Illinois Central when building from Cherokee to Sioux Falls. He was next with the Pacific Short Line, and had charge of all locations and construction from Casper, Wyoming, to Sioux City. He also had charge of the location of the Sioux City & Northern. He had charge of construction for the St. Paul & Sioux City from Emerson to Norfolk, and had charge of the construction of the northern part of the St. Paul & Pacific. He is familiar with the territory through which the Union Pacific line runs from Ogden to Omaha, and familiar with every foot of line of the Fremont, Elkhorn & Missouri Valley from Missouri Valley to Neligh and from Neligh to Valentine. (pp. 1196–1199.) Wakefield.

"Q. From your experience as engineer have you made yourself familiar with the cost of the construction of railroads

in the state to Nebraska; by which I mean to speak of that part of the state of Nebraska with which you are familiar, to-wit, north of the Platte river?

"A. Yes, sir.

"Q. And while you were engaged in the construction of the roads that you have mentioned in the state of Nebraska, did you then know of the actual cost of construction?

"A. Yes, sir.

"Q. Now in addition to the cost of construction, did you make yourself familiar with the cost of equipment which was purchased for the Sioux City & Northern, and also for the Pacific Short Line?

"A. Yes, sir.

"Q. Do you know the price paid for rolling stock, engines, etc?

"A. Yes, sir; I do (p. 1201.)"

The witness prepared and attached to his deposition, Exhibit No. 26 (p. 880), showing the cost of construction of a mile of road, also another table, Exhibit 27 (p. 881, showing the equipment of one hundred miles of road, the summary of which is as follows (p. 882):

$18,497.16 per mile.

Construction of one mile	$13,618.41
Equipment for one mile	4,878.75
TOTAL	$18,497.16

Morgan's Report.

The Pattison Committee, under act of Congress of March 3, 1887, employed Richard P. Morgan, Jr., an engineer, to examine the Union Pacific Line and its branches, and to report to the committee, the then present cost of reproducing the main line of the Union Pacific Railway Company from Omaha to Ogden, and also the branch lines of the Union Pacific Railway system. Mr. Morgan made a detailed estimate of the cost of reproducing the main line of the Union Pacific from Omaha

to Ogden, 1.038.9 miles, and made a total cost of $27,857,500; cost per mile, $26,814 (pp. 1149-1150.)

It appears from the report of Mr. Morgan that he included in the above estimate and mileage the line from Council Bluffs to Omaha, inclusive of the bridge over the Missouri river. This is arrived at by taking into account the mileage included in Mr. Morgan's report. The attention of Mr. House is called to this fact (p. 825.)

Morgan on value of U. P. R. R. $25,814.00 per mile

"Q. Now how much does Mr. Morgan estimates for the cost of the bridge alone?

"A. $1,000,000.00.

"Q. Thus in estimating the cost of reproducing the main line from Omaha west you would deduct, would you not from the total as found in the foregoing quotation $27,857,500.00, $1,000,000.00, or in other words, about $1,000 per per mile?

"A. Yes, sir.

"Q. That, then, would reduce the cost of reproducing the line of the Union Pacific from Omaha west to $25,800.00 mile?

Deducting bridge $25,800.00 per mile.

"A. Yes, sir."

The conclusion to be drawn from the report of Mr. Morgan, coupled with the explanation of Mr. House, is that the Union Pacific line from Omaha to Ogden could have been reproduced or duplicated in 1887 for $25,814.00 per mile.

It must be noted, however, that Mr. Morgan does not make a separate estimate of the cost of reproducing the Union Pacific within the limits of Nebraska, as compared with the cost of reproducing that part of the road extending westward from Wyoming into Utah. It is a well known fact that the only rugged portion of territory through which the Union Pacific runs is beyond the western limits of this state. The attention of Mr. J. E. House is called to this condition of the country, and he estimates the cost of the construction and equipment from Wyoming to Ogden would be from $33,000.00 to

This estimate included cost of building through the mountains west of Nebraska.

$35,000.00 per mile, leaving the cost of construction of the line within the limits of Nebraska west to the 100th meridian to be about $16,000.00 per mile on the basis of Mr. Morgan's estimate (pp. 829, 830). The reason why the cost in Wyoming and Utah is so much greater than in Nebraska is explained by Mr. House as follows: It crosses the mountain ranges and Black Hills, and the Medicine Bow mountains and Wasatch range (p. 830).

The attention of Mr. Wakefield was also called to the report of Mr. Morgan, and he stated (p. 1,205): "The Wyoming line would cost considerable more than the Nebraska lines; it is a more expensive line to grade.

"Q. Then if the entire line through Nebraska and Wyoming would in 1887 cost an average of $26,814.00 per mile you would understand that the part in Nebraska could have been reproduced or reconstructed for the last sum of money?

"A. Yes, I think that is so.

Mr. Morgan also prepared a table entitled "Estimate of present cost of reproducing certain roads and branch lines of the the Union Pacific Railway System." (p. 1,135.) That table represents the mileage and cost of reproducing twenty-seven different lines of road, some of which are in Nebraska and some of which are in Kansas and Colorado. The estimate upon the several lines varies from $13,000.00 to $22,000.00 per mile, but most of them are below $18,000.00 per mile.

Average cost of 27 lines $18,682.00 per mile.

Total mileage of the twenty-seven lines		2,137.07
Total cost of reproduction	$	38,914,400.00
Average cost per mile	$	18,682.00

It is interesting to note that Mr. Morgan, Mr. House and Mr. Wakefield, having no personal interest to serve, are so nearly harmonious in their estimates of the values of building or reproducing these various lines of road. If we are to rely upon their estimates as our guide in this case, cost of building

nd equipping roads in the state of Nebraska is considerably ss than $20,000 per mile.

Oliver W. Mink, one of the Receivers for the Union acific company, was examined briefly with reference to the ost of construction of the Omaha and Republican Valley Rail- oad four hundred and eighty-two miles in length. According o the testimony of Mr. Mink that road was paid for in the onds and stock of the company at a cost of $18,000.00 per ile, including equipment.

O. & R. V. cost $18,000.00 per mile.

"Q. So that the cost of the equipment and construction ncluding the stock at par would make the entire cost of con- truction and equipment but little over $8,000,000?

"A. The book account cost of the road and its equip- nent was $8,666,002.69.

"Q. That would be still less than $19,000 per mile, vould it not?

"A. It is about $18,000 a mile. The $18,000 repre- ents the book account cost of the road." (p. 735.)

Mr. Mink admits however, that if the contractor had been paid in cash, instead of being paid in bonds and stock of he company, it might have been constructed for less money.

"I understand on the theory of some people it might have been constructed and equipped for less money if paid for in ash." (p. 736.)

Or less for cash

The cost of building the Omaha & Republican Valley oad spoken of by Mr. Mink ought to represent the fair cost of reproducing a road anywhere in the State of Nebraska. A glance at a map of the state will show that it was made up of various lines constructed in different parts of the state and extending in all directions. Upon the other hand, the main line of the Union Pacific extends westward through the Platte Valley the almost entire length of the state, thus avoiding either grades, cuts or fills, and with very little bridging. Mr.

Mink admits the two lines of road are constructed over a similar country. (p. 738.)

Testimony for Railroad Companies.

R. W. DEY, civil engineer of the Rock Island lines west of the Missouri river, furnished a tabulated statement of the line from South Omaha to Lincoln and from Lincoln to Jansen, total of 104 miles, in which he makes the cost of those lines to be $27,295.38 per mile. It will be noted that this is much larger than the estimates of either Mr. House, Mr. Wakefield or Mr. Morgan. This increase can partially be accounted for as follows:

cost of C. R. & P. $27,295.38.

a. The line of the Rock Island from South Omaha to Lincoln includes a bridge over the Platte river, which must necessarily have been quite expensive.

ludes a bridge.

b. In Mr. Dey's estimate he has included $56,500 under the head of unaccrued charges; this represents money not yet paid out for either right of way or construction, but contemplates future expenses. This would reduce the cost per mile $543.27.

.00 per mile improperly charged.

c. Under the head of "Right of Way" Mr. Dey has also included $196,000 for property purchased in Omaha, which is not and has not been used by the Rock Island, and with which property the Rock Island road has no direct connection. This would reduce the cost per mile $1,865. Should the lines purchased in Omaha ever be used as terminals, it would be terminal property for the entire length of road running through the state of Nebraska to Denver, Colorado, and thus should be properly apportioned to the entire line, and not apportioned upon the 104 miles, as was done in the table prepared by Mr. Dey.

,000.00 for property not used.

d. It also appears by Mr. Dey's cross-examination that the terminal properties of the Rock Island at South Omaha are

$115,000.00. This he has improperly apportioned to the 104 miles of road, instead of apportioning the same to the entire length in Nebraska. It would make a deduction per mile of over $1,000.00.

$1,000.00 per mile overcharged for South Omaha property.

e. Mr. Day included in his estimate an item of $37[illegible],000.00 for terminal property in Lincoln, which is improperly apportioned to the one hundred and four miles, whereby there should be deducted per mile $3,625.00.

Terminals at Lincoln.

The total deduction that should be made per mile is $7,033.00, leaving the average cost per mile of the Rock Island road, admitting these extras, which should not properly be apportioned to this mileage, $20,262.00.

After proper deductions $20,262.00 per mile.

f. This mileage of the Rock Island was much more expensive than the average mileage in the state by reason of the fact that it runs through a hilly, rough country.

"Q. Is it a hilly, rough country?
"A. Yes, sir.

"Q. It follows no stream?
"A. No, sir.

"Q. It runs from South Omaha right through the hills?
"A. Yes, sir.

"Q. So continues until it gets to Lincoln with the exception of a little ways along the Platte Valley?
"A. Yes; then a little way outside of Lincoln, for three or four miles.

"Q. You built that bridgeway for the road over the Platte river, did you not?
"A. Yes, sir,

"Q. And that is included in the cost of the construction of the road, is it not?
"A. That is in the items of bridges."

Mr. Day, when further inquired of as to whether or not this one hundred and four miles was not more expensive than the average cost of constructing a road through the state, an-

swered: "Yes, it would cost more money than it would through the state as an average."

g. The examination of Mr. Dey, we should further note, was very unsatisfsctory, for the reason that he produced a tabulated statement prepared to show the cost of the road, but did not produce the books from which the statement was made, so that we were deprived of any opportunity of examining the items of account which went into his table of cost of construction.

Mr. T. E. Calvert, of the B. & M. R. R. in Nebraska, had his attention called to Exhibit 26, being the tabulated statement of Mr. Wakefield, representing the cost per mile of constructing one hundred miles of road. "I should say that some of the items here were rather low for construction in Nebraska generally; the conditions here are somewhat different in different parts of the state." (p. 1255.)

Mr. Calvert then proceeds to examine Mr. Wakefield's table with reference to the cost of construction of the B. & M. road, and testifies that there should be added the following to Mr. Wakefield's estimate, in order to approximate the valuation of the B. & M. in Nebraska:

ert makes B. M. $21,371.26 mile.

Grading, per mile	$ 560.00
Grubbing and clearing, per mile	400.00
Ties, per mile	482.40
Steel rails	349.00
Splices and bolts	57.00
Spikes	24.00
Nut locks	14.00
Water stations	61.00
Section houses	29.00
Locomotives	95.00
Coaches	16.80
Box cars	480.00
Flat cars and stock cars	75.00
Refrigerator cars	52.50
Stock yards	38.40

Coal chutes	60.00
Sleepers and dining cars	80.05
Total	$2,874.10
(pp. 933-936.)	
Wakefield's estimate	$18,497.16
Total	$21,371.26

This small increase of Mr. Calvert over the estimate of Mr. Wakefield is mostly attributable to what Mr. Calvert considers as *superior material* both in construction and equipment, which *he claims is used* on the B. & M. road. It is not at all a criticism on the estimate of Mr. Wakefield for the construction of what is recognized by railroad men as a standard road, using what is commonly termed "*standard equipment.*"

Mr. Calvert farther contends that the B. & M. road, in its present condition is worth more than a road newly constructed, or in other words, has cost a great deal more than a new road would cost, on account of what is commonly termed betterments, such as the widening and repairing the sides of the embankment, the putting in of new ballast, etc. (pp. 1262-1263.)

Virgil G. Bogue, who was the chief engineer of the Union Pacific from November, 1886, to February, 1890, was called as a witness by the company to establish the *present valuation* of the Union Pacific line in Nebraska. For purposes of his own he divided the Union Pacific main line into sub-divisions, giving a statement of the mileage, terminal lands, value of terminal lands, cost of clearing and grubbing, cost of grading, cost of bridging, value of buildings including furniture, value of track, cost of ballasting, miscellaneous expenses of each of the sub-divisions, aad then gave what he termed a grand total valuation of each of the sub-divisions. (pp. 1382-1384.) Bogue.

We have taken the same sub-division given by Mr. Bogue,

stating the mileage, the grand total valuation, and then estimating the valuation per mile, which gives the following results:

GILMORE TO VALLEY:

Main line, 24.97 miles; siding, 9.12; total, 34.09.

Grand total valuation	$ 557,471.00
Valuation per mile—main line	23,127.00
Valuation per mile—total mileage	16,984.00

VALLEY TO COLUMBUS:

Main line, 56.52 miles; siding, 16.25; total, 72.27.

Grand total valuation	$ 960,384.00
Value per mile	13,288.00
Valuation per mile—main line	16,990.00

COLUMBUS TO GRAND ISLAND:

Main line, 62.35 miles; sidings, 26.1; total, 88.45.

Grand total valuation	$1,410,789.00
Valuation per mile—main line	22,626.00
Valuation per mile—total mileage	15,948.00

GRAND ISLAND TO KEARNEY:

Main line, 42.2 miles; sidings, 9.59; total, 51.79.

Grand total valuation	$ 672,111.00
Valuation per mile—main line	15,926.00
Valuation per mile—total mileage	12,977.00

KEARNEY TO JULESBURG:

Main line, 176.09 miles; sidings, 36.38; total, 212.47.

Grand total valuation	$2,398,911.00
Valuation per mile—main line	13,623.00
Valuation per mile—total mileage	11,290.00

JULESBURG TO WYOMING STATE LINE:

Main line, 100.46 miles; sidings, 15.81; total, 116.27.

Grand total valuation	$1,339,445.00
Valuation per mile—main line	13,332.00
Valuation per mile—total mileage	11,520.00

The sum total of the above valuation is	$7,339,111.00
Total mileage in main line in above subdivisions	462.00
Average valuation per mile	15,885.50

rage for U. P. R. in Neb. r mile $15,- 59.

The above estimate of Mr. Bogue does not include the

equipment. By comparison we will find that the same is but very little higher than the estimate of Lester A. Wakefield and J. E. House. Wakefield's estimate of road without equipment is (p. 1203), $13,618.41.

J. E. House's estimate for road	$11,831.84
Building machinery, etc	750.00
Superintendence, etc	836.56
Total	$13,445.40

The fact that Mr. Bouge's estimate is somewhat higher than that of J. E. House and Lester A. Wakefield may be explained by noting the fact that Mr. Bogue adds to his estimate the present valuation of ballasting on the Union Pacific road, and certain other large items under the head of miscellaneous.

The allowance for equipment by Wakefield is	$4,878.75
J. E. House's estimate of equipment	4,714.60

The respective railway companies are required to make a report to the state auditor of the amount and valuation of their rolling stock. From these reports tabulated statements have been prepared showing the rolling stock in detail and the valuation of the same belonging to the respective roads within the limits of the state of Nebraska. These tabulated statements are found from (pp. 938-956.) From these there has been prepared another table (p. 948) showing the total value of the equipment of the Union Pacific main line in Nebraska to be $2,273,390.00

which, opportioned to 467.48 miles of main line, makes the mileage equipment to be	$	4,863.07
Adding this equipment to the average mileage, cost of constructson of road, as given by Mr. Bogue	$	15,885.50
We find the average total valuation of the main line of the Union Pacific from Gilmore to the west of the state to be	$	20,748.57

U. P. R. R. [illegible] cluding equipment $20,74[illegible]

We assume this $20,748.57, according to the testimony of Mr. Bogue, to be a fair present valuation of the main line of the Union Pacific company within the state of Nebraska. The Omaha & Republican Valley line, 481.44 miles, is of less value, as the equipment upon that line averages, per mile, (p. 942).....$518.00

uipment of her R. R.

The milage equipment on the St. Joe & Grand Island is (p. 945).....$1,388.00

The milage equipment of the K. C. & Omaha Ry. Co. (p. 947).....$1,413.00

The mileage equipment of the C. B. & Q. in Neb. (p. 950).....$1,866.00

The mileage equipment of the F. E. & Mo. Valley (p. 952).....$1,665.00

The aveage equipment of the U. P. lines in Neb. (p. 948).....$2,456.00

It will thus be seen that the mileage valuation of epuipment of all the other roads is less than that the Union Pacific main line, by reason of the fact that a much larger equipment per mile is allowed to the main line of the Union Pacific than to any of its branch roads.

CONCLUSION.—The fair conclusion to be drawn from the foregoing testimony is that the mileage value of the roads in Nebraska is less than $20,000. The amount allowed for equipment in the estimate of J. E. House and of Lester A. Wakefield is greater than the equipment per mile of any of the roads in the state of Nebraska, excepting the main line of the Burlington and the main line of the Union Pacific, and is greater than the average equipment per mile of the Union Pacific system in Nebraska, and greater than that of the Burlington system in Nebraska. The fact that the equipment on the main line of the Union Pacific, according to the above statements, is apparently so much larger than that of its branch lines arises from the fact that much of the equip-

ment reported as belonging to the main line of the Union Pacific is used in operating the Omaha & Republican Valley, the St. Joe & Grand Island, and the Kansas City & Omaha lines.

BOGUE'S SUMMARY STATEMENT OF THE VALUE OF THE MAIN LINE OF THE UNION PACIFIC. Mr. Bogue, after giving the summary of the valuation of the several divisions of the main line of the Union Pacific in Nebraska as hereinbefore stated, proceeded to give a summary of the value of the Union Pacific from the Missouri river to the Wyoming state line, in which he gave the grand total valuation to be (p. 1384)..... .....$17,470,932.00
Value per mile (p. 1384)..... ..... 37,003.00

At first glance it would appear that this summary valuation of Mr. Bogue is nearly double the valuation per mile as shown by his valuation of sub-divisions. This enhanced valuation per mile by Mr. Bogue was arrived at as follows:

a. Included in this mileage is 199.79 miles of sidings and spurs, whereas in his sub divisions he had only for sidings and spurs 113.16. He thus added eighty-six miles of extra track; nine miles of this was the track from Omaha to Gilmore, the remaining seventy-seven miles were sidings and spurs, included in what Bogue classed as the Omaha terminals; or in other words, he added all the siding and tracks on the Omaha terminals as a part of the Nebraska line. This seventy-seven miles, computed at the rate of $20,000 per mile, would be $1,540,000.

b. Mr. Bogue, in his last sumary also added an additional item representing the value of terminal lands at Omaha, $4,196,101.00. The two last above items aggregate $5,709,101.00; or more than $12,000 per mile, which should be deducted from Mr. Bogue's average of $37,00 per mile.

c. He also included the value of headquarters building

at Omaha, interest in the Union Depot property, and other moneys expended by the Union Pacific company for the construction of viaducts in Omaha, and many other items which we will consider when we come to speak more specifically of this terminal property.

The only point we now desire to make is that all the items which have been put in this summary of Mr. Bogue to swell the average mileage valuation from $15,885.50 to $37,000.00 per mile should be discarded for the following reasons:

a. We will show that Bogue's valuation of the terminal properties is out of proportion to the real value.

b. Terminal properties at Omaha are for the use of the entire Union Pacific system of more than 7,000 miles of road, and is therefore improperly apportioned to the mileage of the main line alone in the state of Nebraska.

The Estimate of $20,000 per Mile Valuation is too High According to Gov. Pattison, Marvin Hughitt and Jay Gould.

Pattison in his report says: (p. 1194.)

. & P. R. $22,-00.

"The engineer estimates that the Sioux City & Pacific can be reproduced for about $22,000 per mile. Yet Mr. Marvin Hughitt of Chicago, the president of the Chicago & Northwestern Railroad Company, told the commission that he could duplicate the Sioux City & Pacific line for $9,000 a mile. Recently the track of the Sioux City & Pacific was appraised by two eminent engineers for the purpose of fixing the rental which the Fremont, Elkhorn & Missouri Valley Railroad should pay for passing over thirty-one miles of track of the Sioux City & Pacific, and that appraisment fixed the present value of that section of about $11,000 per mile. It was the most expensive portion of the line of the Sioux City & Pacific. Mr. Jay Gould told the commission that he was building roads at a cost of $9,000 per mile, and related how he had proposed to the directory of the Union Pacific, shortly after

ld said could uild roads for ,000.

the passage of the Thurman bill, to duplicate or parallel the main line of the Union Pacific from Omaha to Ogden for $15,000,000."

The Annual Net Earnings of the Road in Nebraska Make an Enormous Percentage on their Present Valuation and on the Money Legitimately Invested Therein.

Mr. W. A. Dilworth, who all through this case has been accepted by all parties as a qualified expert upon such matters, and who has been frequently called by all parties to the litigation to sustain the respective issues in the case, prepared a table, Exhibit 22, (p. 1040), setting forth the mileage of the main lines of several of the roads, and the net earnings per mile of the said roads, and the percentage of net profit upon a valuation of $18,000 and $20,000 per mile respectively. *From that table it appears that the earnings of the B. & M. in Nebraska for 1892 on the mileage valuation of $20,000 per mile was 37.7 per cent. and the earnings of the Union Pacific main line was 26.9 per cent.* The correctness of that tabulated statement of Mr. Dilworth has not been questioned by any witness in this case. It stands as an admitted fact. Think of the enormity of this annual net profit. Why, in less than *three years* the net profit on the main line of the B. & M. in Nebraska would *reproduce its line of road* with all its equipment and leave a surplus.

Table showi
earnings on 2
000 valuati
per mile
1040.

The enormous *profit* on the main line of the *Union Pacific* would in *four years reproduce* its main line from the Missouri river to the Wyoming border, including its rolling stock, station houses, telegraph lines, etc. It is in the face of this admitted state of facts upon the record that the B. & M. R. R. is contending that the state law, which would reduce its general income but 4.2 per cent., and the Union Pacific Company only 2 per cent., would amount to the confiscation of

their railroad properties. Such a preposterous claim is without a parallel in the business history of the world.

The Balance Sheets of the Union Pacific do not Show the Full Earnings of that Company.

According to the table furnished by Mr. Mink (pp. 718-719) the net earnings of the Union Pacific system do not seem to be very large. A little closer observation, however, will show that the earnings on the Union Pacific system over and above operating expenses are about 60 per cent.

The gross earnings in 1889 were	$40,941,063	
Working expenses in 1889	25,620,565	
Profit	$15,320,565	59.4-5%
Gross earnings in 1890	$44,538,201	
Working expenses in 1890	30,635,927	
Profit	$13,902,374	45.1-3%
Gross earnings in 1891	$44,600,730	
Working expenses in 1891	28,680,548	
Profit	$15,920,182	55.1-2%
Gross earnings in 1892	$45,025,176	
Working expenses in 1892	28,513,840	
Profit	$16,511,336	57.6-7%

Aside from these enormous percentages of earnings, over and above the expense of operation, it will further be noted that there was a constant increase of earnings of the Union Pacific system during each of these years, and during the last three years a marked decrease in operating expenses. The table shows that the Union Pacific System, during these years was increasing its income. *Why was not the Union Pacific road making money.*

Why U. P. R. was not saving money.

a. Because the Union Pacific Company, in the operation

of what is termed the Union Pacific System, has every year wasted and squandered a large amount of money in its attempts to maintain lines that were wholly unprofitable. Unprofitable branch lines.

b. For that the Union Pacific company is undertaking to pay interest upon a bonded debt, 50 per cent. of which does not represent any money actually invested in the road. Interest on fictitious capital.

c. It has outstanding sixty millions of stock, upon which an effort is being made to pay a dividend, while not more than 16 per cent. of the entire sixty millions of stock was ever paid for in money.

d. For that the road has been in the constant habit of wasting and diverting its income by way of rebates to favorite friends and in investments in private enterprises in which certain of the directory of the road are interested. Rebates.

e. Because it has in its capitalization ONE HUNDRED MILLIONS of watered bonds and stock. $100,000,000 water.

POOLS AND REBATES. On page 1169 will be found a table showing the earnings of the Union Pacific company up to 1887 to be.....$315,303,504

Operating earnings..... 169,916,078

Net profits.....$145,387,425—85½%

Here was sufficient net profit to pay the cost of reconstructing the Union Pacific line every five years. Out of this enormous profit grew the evil of favoritism, pools and rebates. On page 1170 is found a table, from which it appears that the Union Pacific and Kansas Pacific paid out in

Pools..... $4,004,512.48

Rebates..... 11,577,096.62

Total.....$15,581,604.10

This sum alone is more than half enough to reconstruct

the Union Pacific line from Omaha to Ogden, according to th testimony of Mr. Richard P. Morgan, Jr.

BRANCH LINES.—The Pattison committee reports (p. 117

"In the accounts of the Union Pacific it was found tha $38,000,000 of the funds of that company had been expende for the construction of branch lines; that many millions addi tional were squandered in purchasing bankrupt branch lines a excessive prices, and that the earnings of the express and tele graph service of that company, as well as that of other bond aided companies, were, in violation of law, placed under th control of express and telegraph companies in which some o the managers of the Union and Central Pacific companies wer largely interested, and of which they were the main benefici aries."

LEGAL EXPENSES.—

"Large sums were also squandered by some of the bond aided companies to pay for the services of lawyers to influenc legislation, the total legal expenses of the companies being a follows:

Union Pacific and Kansas Pacific $2,349,554.8

DEFICITS ON BRANCH LINES.

Injustice of the Union Pacific Company Charging to Shippers Upon the Main Line Tariff Rates Large Enough to Allow the Union Pacific Company, ou of its Earnings, to Pay Deficits on its Branch Lines.

The Union Pacific Company, has not of itself furnished, in this case, a report of the gross earnings of the main line o the Union Pacific. It at all times has its earnings mingled with its other lines; whereas the branch lines are not so profitable as the main lines. That manner of presenting the accounts tends to show a reduced earning.

It has another unfortunate sytsem of bookkeeping. Sev eral of its branch lines are so strangely constructed as not

of themselves to pay operating expenses with interest on their founded debt. The accounts of such branch lines are kept separate, so that they indicate on the face therefore a deficit. The *amounts of such deficits are paid out of the earnings of the Union Pacific company proper, and thereby the net earnings of the Union Pacific company proper are apparently reduced.*

Real earnings of main line are reduced by applying pay of same on deficits on branch lines.

THE OMAHA & REPUBLICAN VALLEY.—The Union Pacific Company then took the control and ownership of the bonds and the stock of the Omaha & Republican Valley Company, and by reason of its contract relationship, the Union Pacific Company was bound to pay the deficit of interest on the bonds of the Omaha and Republican Valley and also the deficit in its operating and other expenses. *The Union Pacific Company charged up to these accounts as expenses all the moneys it would pay out by way of deficit in the operating and other expenses of the Omaha & Republican Valley Company, and also it should pay out by way of interest upon the bonds of the Omaha & Republican Valley Company.*

Whereas the Union Pacific Company claims all the time, that it made money by hauling freight received over these lines, it nowhere gives the Omaha & Republican Valley credit for any such earnings. *The Union Pacific Company being a large owner in the bonds of the Omaha & Republican Valley Company, would itself receive the very interest on these bonds; or in other words, the Union Pacific Company was simply transferring money to itself, and thus keeping the money in fact, there being only a mere matter of manipulation in bookkeeping, while upon the balance sheet the Union Pacific Company was charged with the amount of all these deficits as a loss sustained by the Union Pacific Company,* and at the same time the Omaha & Republican Valley Company was made to appear to be an unprofitable road. As an example of deficits paid, Mr. Mink states (p. 699):

U. P. R. does not give branch lines credit for earnings from the long haul.

"Q. Can you state the deficits for the years 1889 to the

present time, of the Omaha & Republican Valley, which have been met by the Union Pacific Railway Company, or out of the earnings of that company?

cits on R. V. Co., paid by P. R.

"A. In 1889, the deficit was $356,256.27; in 1890, the deficit was $471,535.63; in 1891, the deficit was $515,779.95, in 1892, the deficit was $335,845.34.

"Q. How were these deficits cared for?

"A. The deficits enumerated by me represent the excess of the operating expenses, taxes, interest on bonds and some small sinking fund contributions, over and above the amount of gross earnings and the entire miscellaneous earnings of the company. As a very large part of the funded debt is owned by the Union Pacific Railway Company, the Union Pacific Company has merely omitted to present its coupons, or some of them, for collection. Therefore, the deficit appears more in the nature of unpaid interest obligations, in respect to these particular years, than it does in the way of an open or book account."

The amount of the deficit paid for the four years aggregated $1,679,417.19. On the face of the earnings of the Omaha & Republican Valley company, as the accounts are manipulated, as above shown, it would appear that the Omaha & Republican Valley company is not earning sufficient money under the present tariff rates to pay its operating expenses and other fixed charges, including interest on its funded debt. That is no reason, however, why the Maximum Freight Law should not be enforced and the rates reduced. *In this litigation we cannot consider the Omaha & Republican Valley company as a distinct corporation in its operation, because it is not such, and never was such.* It must be treated and considered as a part of the Union Pacific system.

Again, the Omaha & Republican Valley line runs in circuitous lines, and into such out of the way places that it has not and never can become a competing line with any of the trunk lines. In short, the shipper from any point to which the Omaha & Republican Valley reaches must, if he would

seek a direct line of transportation, transfer, or ship his product over some other road.

Why should the shipper over the main line of the Union Pacific be required by the Union Pacific Company to pay such a high local tariff rate as should pay a fair revenue to the Union Pacific, and also pay such additional sums as would help to pay the deficit arising from the tariff paid by the shipper of cattle from some point on the Omaha & Republican Valley road. The citizen of Grand Island, in the consignment of cattle to South Omaha, has the use of the main line of the Union Pacific. Why should the Grand Island man be taxed for the purpose of helping pay freight for the cattle man of Stromsburg, whose cattle come in over the Omaha & Republican Valley? Why should the people in one part of the state be charged a high rate to help out the people living in another part of the state?

Why should rates on U. P. R. R. so high as necessary deficits on other lines.

Put in another way the question is this: These railroads are public highways constructed as business enterprises by private individuals, under authority granted from the state. In a measure they are speculative enterprises, like any other business enterprise. They may prove fortunate or they may prove unfortunate, according to conditions and management.

Now, if it so happens that the movers of a railway enterprise built an unprofitable and unfortunate road, by reason of its location and other conditions, *are the people of the state who do not live upon or utilize that unfortunate line of road, to be taxed or burdened in order to sustain that unfortunate business railway enterprise? It will not do to say that the freight rates in the state of Nebraska shall be kept so high that this unfortunately situated road shall be able to earn a profit on the investment.*

THE ST. JOSEPH & GRAND ISLAND.—The St. Joseph & Grand Island Railroad Company furnishes another illustration. The capital of that company is $4,600,000. The Union

Pacific owns of this $2,301,500. (p. 700.) The total mortgage debt of the St. Joseph & Grand Island is $8,680,000. (see p. 378.) The mortgage debt per mile, $35,000. The Union Pacific company is under contract to make good to the St. Joseph & Grand Island any deficit required to discharge the interest on its first mortgage bonds. (p. 701.)

Think of this condition. The Omaha & Republican Valley has a bonded debt of $11,000 per mile. The St. Joseph & Grand Island has a mortgage debt of $35,000 per mile. Mr. Mink admitted that $18,000 paid the cost of construction and epuipment of the Omaha & Republican Valley, and the Union Pacific company certainly had brains enough in its management to know that the St. Joseph & Grand Island was not worth over $18,000 per mile, and yet they entered into a contract with the St. Joseph & Grand Island, by which they were to pay any deficit of interest on a bonded debt of $35,000 per mile. Why of course under reasonable tariff rates the St. Joseph & Grand Island Company could not earn enough money to pay its operating expenses, and interest on such an enormous bonded debt, and have anything left for the stockholders. Mr. Mink states the amount of deficit paid for the St. Joseph & Grand Island as follows: (p. 702.)

Deficits on St Joe & G. I. paid by U. P. R.

"Q. Have there been deficits for the last four years of that company which the Union Pacific railway has been obliged to meet or has met? If there have, you may state them for each year?

"A. The deficit was for 1889.....$ 69,002.85
For 1890 it was..... 185,328.14
For 1891 it was..... 260,296.48
For 1892 it was..... 63,466.90

"Q. Has the Union Pacific Railway company paid these deficits or provided for them?

"A. It has."

The total of these deficits for the four years is $578,094.-

37. *Why should the Union Pacific company tax shippers upon its main line to pay this deficit arising upon the St. Joseph & Grand Island?* It is taxing the man in Grand Island to benefit the man in Hastings. It is taxing the shipper of Fremont and of Columbus to benefit the shipper of St. Joe.

In an earlier part of this brief, under the head of "Discrimination," we exhibited to the court the showing that the St. Joseph & Grand Island was so managed as to carry into and out from St. Joe, in the State of Missouri, tonnage of every kind and character at a less rate per mile than the same was carried on the Union Pacific. The result is that you have this Union Pacific Company taxing the local shipper a tariff rate on its main line not only sufficiently large to pay a proper revenue to the main line, but an additional sum to help pay these deficits on the St. Joe & Grand Island line, and eventually and ultimately to enable the Union Pacific company and the St. Joseph & Grand Island company to discriminate against the people of Nebraska and in favor of the citizens of St. Joseph, Missouri. The fact that the St. Joseph & Grand Island road shows a deficit is no reason for saying that the rates established by the Nebraska Maximum Freight Law are confiscatory.

The Cost of Construction of the Union Pacific.

The funded liability of the Union Pacific on the 31st of December last was	$134,598,461.48
Total funded and unfunded liability	145,236,606.73
Capital stock	60,868,500.00
Liability per mile	109,000.00

U. P. R. debt p mile.

The above is the statement of Mr. Mink (p. 742). This is apportioned over the mileage of the Union Pacific Railway company.

The mileage liability of the Union Pacific main line from Council Bluffs to Ogden is greater than this relative propor-

tion, as certain of the mortgages rest solely upon the main line from Omaha to Ogden. To justify this enormous mortgage liability the Union Pacific Railway company represented its cost of construction from Council Bluffs to Ogden on the 31st of December, 1869, to be..... $ 93,457,498.57

The construction account up to and just prior to the consolidation with the Kansas Pacific was (p. 747)..... $118,753,718.02

The original contracts of construction according to the testimony of Mr. Mink (p. 747-749) were as follows:

Hoxie contract per mile.....							$50,000
Oakes Ames contract per mile,				first	100	miles.....	42,000
"	"	"	"	second	167	"	45,000
"	"	"	"	third	100	"	96,000
"	"	"	"	fourth	100	"	80,000
"	"	"	"	fifth	100	"	90,000
"	"	"	"	sixth	100	"	90,000

Mr. Mink of course was speaking of the cost of construction as it appeared on the book account of the Union Pacific Company. He was not connected with the road until long after the work was completed and therefore had no personal knowledge of the cost of construction. The Pattison committee took a large amount of evidence on the cost of construction and summed up the matter as follows (p. 1154):

"Third. The result of these three contracts was as follows:

Cost to Railroad Company—

Book cost.

Hoxie contract.....	$12,974,416.24
Ames contract.....	57,140,102.94
Davis contract.....	23,431,768.10
Total	$93,546,287.28

Cost to Contractors—

Hoxie contract.....	$ 7,806,183.33

Ames contract.....	27,285,141.99		
Davis contract.....	15,629,633.62	$50,720,958.94	Actual cost.
		$42,825,328.34	
To this should be added the amount paid Credit Mobilier on account of 58 miles..		$ 1,104,000.00	Surplus
Total profit on construction.....		$43,929,328.34"	

It will thus be seen that about one-half the cost of construction went into the pockets of the contractors, or in other words that only about one-half this sum of money was ever invested in railroad property. These watered contracts were made the first foundation for watering the capitalization of the company.

J. E. House on Cost of Construction of the Union Pacific.

House on cost U. P.

He was an engineer employed by the Union Pacific from 1863 to November, 1869. He had to do with making the surveys and estimate the cost of the construction. He was engineer in charge of construction during the building of a part of the the line, and afterward was in charge of the chief engineer's office. (p. 790–791.) The original estimate of cost of construction from Omaha west per mile was $30,000. (p. 795.) This estimate he considered a very liberal one, and included equipment. (796.)

"After reaching the valley of the Platte river the entire line of the Union Pacific lies within the valley of the Platte river and its tributaries through the state of Nebraska, so its line follows closely the drainage of the state, and its grades are light, and its excavation is very light." (p. 797.)

Original estimate $30,000.00.

This first estimate was for what was known as the Dey line, which ran between Omaha and the Elkhorn river, and it cost about $5,000 a mile more on grades than the Mud Creek line. (p. 800.) The Dey line was abandoned and the road

built out of Omaha over the Mud Creek line, thus reducing the estimate on accoudt of that change $5,000 a mile for a distance of eighteen miles.

The first estimate of $30,000 a mile was transmitted to the New York office, when the estimate was returned from the New York office and instructions issued to increase the estimate to $50,000 per mile. It was on account of this order that Mr. Dey resigned as chief engineer and was succeeded by John E. Henry. (p. 801.) This order for an increased estimate came from Thomas C. Durant.

N. Y. office ordered it raised to $50.-000.00.

"Q. Was this Thomas C. Durant an engineer by profession, or had he any experience in that line so far as you know?

Durant ordered this increase.

"A. He had none so for as I know.

"Q. Under this direction from Durant brought by Henry, what was done by way of preparing a new estimate?

"A. A new estimate was prepared and made out at the rate of $50,000 a mile.

"Q. And state whether that was over the same line which had been surveyed as the basis of the first estimate of $30,000 per mile?

"A. The two lines were common, yes, sir.

"Q. What was the manner of procedure to increase the estimate from $30,000 to $50,000 per mile?

"A. The different prices for material, as shown upon the one estimate, was increased in proportion to represent the different amounts.

"Q. Do you know any reason for making that increase from $30,000 to $50,000 per mile, other than this order from the New York office, heretofore stated by you?

"A. That is all I know about it."

After this increased estimate was made the first contract was let in the name of Hoxie for construction and equipment per mile.....$50,000.00

Original estimate for 2nd 100 miles $27,000.00.

Afterwards an estimate was made for a second 100 miles of the road. It appears from the testimony of Mr. Dey in

the Pattison committee that the original estimate on the second 100 miles was per mile (p. 804).....$27,000.00

The Hoxie contract for $50,000 per mile was then assigned to John R. Duff (p. 807) who was a director of the Union Pacific, and the contract from Duff went to trustees for the Credit Mobilier, Thomas C. Durant, C. S. Bushnell, John B. Alley, Springer Harbaugh and Oliver Ames, (p. 807-808.)

Mr. House had in his possession a memorandum of the original estimate of cost of construction, including shop buildings at Omaha and improvements upon the terminal property, and aggregate.....$3,900,874
This was per mile of road..... 39,000

This was apportioning all of the terminal buildings at Omaha to the first 100 miles of road. Mr. House then proceeds to show that this estimate was greater than the actual value of that work, and enumerates the excessive charges in that estimate as follows:

Grading and bridging, excessive, per mile....	$ 5,000
The item of shop building at Omaha, excessive...	10,000
Car shops, excessive.....	8,000
Blacksmith shop, excessive.....	2,500
Engine house, excessive.....	5,000
Water tank, excessive.....	2,500
Passenger house and office, not built.....	20,000
Freight house, excessive.....	8,000
Transfer and turn table, excessive.....	3,000
Station house and tanks, excessive.....	22,000
Locomotives, excessive.....	40,000
Box cars, excessive.....	1,500
Stock cars, excessive.....	7,500
Platform cars, excessive.....	3,000
Transportation, excessive.....	81,150

House states excess in estimates over cost of improvements on terminal property at Omaha.

"Q. *Taking the deductions you have made, or, in other words, the items of excessive charges appearing in this exhibit, defendant's No. 1, what would have been, according to your*

statement, a fair sum of money to a single mile of construction as conditions then existed?

"A. *It would be about $25,000 a mile* (pp. 820-821.)

* * * * * * *

$0.00 per mile estimate of original cost of P. Ry.

"Q. *That would reduce the cost of construction, under the Hoxie contract, to the contractors in the neighborhood of $25,000 to $26,000 per mile?*

"A. *Yes, sir.*

"Q. What do you say as to that being a fair consideration for the construction and equipment of the first 100 miles of road at the time the same was constructed?

"A. I would think it would be a fair estimate." (p. 822.)

We all understand that the cost of construction is today much less than it was at the time the Union Pacific was built, by reason of the great reduction in the price of iron, and of steel rails, and also by reason of improvements and reduction in prices of engines and other railway equipment, and also in the cheapened facilities for constructing road bed, by the use of wheel scrapers, all of which accounts for the fact that the road could now be duplicated for less than $20,000 per mile.

WE ARE DEALING WITH THE ROAD AT IT IS TODAY.—The present Maximum Freight Law is not a law to regulate freights in 1869 or 1870, but to regulate rates upon the road as it exists now or at the time when the law was passed. The legislature was not seeking to interfere with freight rates during the past years, but were dealing only with the present and with the future. So in this litigation *we have to look only to the present value of the road.* The fact, therefore, that it cost *a larger sum to build when constructed,* and the fact that it was bonded and stocked for so large a sum of money, *has nothing to do with the present inquiry,* other than to show that the road was originally bonded and stocked for about double the money that entered into its construction, and the bonds and

t original cost t present lue that con- ls.

stocks represent a sum 400 per cent. greater than the present value of the property.

The Union Pacific Company has no more right to ask the people who use its road to pay interest upon its watered bonds and stocks than a man who owns a building, which has cheapened by changed conditions and gone into decay by use and age, to insist upon his tenants paying enough rent to pay interest upon a mortgage which the owner has put upon the building at an excessive valuation when the same was new.

Value not interest on watered stocks as bonds.

It cost an enormous amount of money to build the pyramids, but if they were to be sold at auction for what they are worth the valuation would be small.

Union Pacific Company Not Entitled to Ask a Rate That Will Yield a Profit on Cost of Construction.

In *Reagan vs. Farmers' Loan & Trust Co.*, 154 U. S., 412, Mr. Justice BREWER said:

"It is unnecessary to decide, *and we do not wish to be understood as laying down as an absolue rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable.* And yet justice demands that everyone should receive some compensation for the use of his money or property, if it be possible, without prejudice to the rights of others. There may be circumstances which would justify such a tariff; *there may have been extravagance and a needless expenditure of money; thire may be waste in the management of the road; enormous salaries, unjust discrimination as between indiridual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value; the road may have been unwisely built, in localities where there is no sufficient business to sustain a road.* Doubtless, too, there are many other matters affecting the rights of the commuaity in which the road is built as well as the rights of those who have built the road."

Reagan vs. F. L. & T. Co.

This applies to original construction of U. P. Ry.

GOVERNMENT AID.

Government Aid to the Union Pacific Was More Th Sufficient to Pay Its Entire Cost of Construction.

Government aid greater than cost of road.

a. There was available for the building of these roads in United States bonds, per mile.....$16,(
Bonds of the company secured by a first mortgage, per mile..... 16,(

Total.....$32,(

According to the testimony of Mr. House these items al would have been sufficient to have constructed the road fr Omaha to Ogden. According to report of the Pattison co mittee of the amount actually paid to contractors this amo was also quite sufficient to pay the cost of construction. this basis all the remaining outstanding bonds of the compa practically represent money that went into the pockets of men who had the enterprise in charge, and for which the p ple have received no benefit or consideration.

Peter A. Dey testified before that commission that main line of the *Union Pacific* could be paralleled and equip *in 1887 for $25,000 per mile.*

Land Grants to the Union Pacific.

Land grant.

The Union Pacific company received a large land gr from the general government. At the first available opp tunity it issued what is known as the land grant mortga According to the accounts of Frederick L. Ames, presented the Pattison committee, the proceeds of these lands would p the outstanding bonds and leave a surplus of $16,000,000.(The accountants employed by the Pattison committee fou the entire value of the land grant of the Union Pacific Railw Company to be (p. 135) $44,911,637.00.

Sufficient to build the road.

If the above estimate is right the land grant of itself w almost sufficient to pay for the cost of construction of

Union Pacific and Kansas Pacific roads. The land grant to the Union Pacific line alone, summarized by the Pattison committee, on page 136 of Report, is as follows: (See p. 1162.)

Acres granted	11,309,844.00
Amount realized on land sales to December 31, 1886,	$ 19,090,672.42
Value of lands unsold	2,395,507.00
Acres patented	2,616,178.00
Selections pending	531,504.00
Acres sold	7,986,346.41
Acres unsold	3,175,507.00
Acres sold and unpatented	5,370,168.00

Average price per acre, $2.39.

This report shows the land grant more than sufficient to reproduce the Union Pacific line from Omaha to Ogden, and more than sufficient to pay its original cost of construction according to the original estimates.

Land grant in Neb. double the value of road.

PAID FOR TWICE.—The people, through the general government, by its subsidy and by its land grant, have already twice paid the cost of construction of the road, and have twice paid for the present valuation of the property. *The land grant within the State of Nebraska has been of itself quite sufficient in value to pay double the cost of construction or double the value of the road within the state.*

The land grant per mile was 12,800 acres.

For the mileage of Nebraska it would be (p. 960) 5,983,232 acres.

This land was worth in 1873 and 1874, per acre, $4.00 to $5.00

At the present time it is worth, per acre, $10.00 to $12.00. (See p. 961.)

There has been sold up to December 31, 1878, 1,539,296.98 acres.

The amount realized from these sales was $4,794,174.15.

The number of acres remaining unsold December 31st, 1878, was 10,406,703 acres.

The total land grant to the Union Pacific Company is about 12,000,000 acres.

$57,000.00 per mile.

Estimating 12,800 acres per mile for the Union Pacific line from Omaha to Ogden at $4.50 per acre, would be $57,600 per mile. (p. 642.)

By this manner of computation it will be seen that the land grant to the Union Pacific was worth double the present valuation of the road, and more than double the cost of construction of the four hundred miles within the limits of the state of Nebraska.

In the face of all the foregoing facts, the Union Pacific Company, having received such bountiful benefits from the general government, and indirectly from the people who make up the government, is not put in a very enviable light, when it comes before the court saying to the people that they have no right to reduce its local freight rates within the state.

Aid to Other Railroad Companies.

1. Sioux City & Pacific.—The Sioux City & Pacific received 600 acres of land, mostly located in the state of Iowa, to be distributed to 109 miles of road. The Sioux City & Pacific also received aid bonds to the amount of . . . $1,629,000

Government aid to S. C. & St. P.

Per mile, about 16,000

These lands and bonds were sufficient to pay the full value of the Sioux City & Pacific.

2. The Sioux City & St. Paul.—The Sioux City & St. Paul is also a part of the Chicago, St. Paul, Minneapolis & Omaha, and constitutes a part of the Chicago & Northwestern system. This line received a land grant of 524,800 acres. It reported sales at an average price of $6.51 per acre (p. 967).

S. C. & St. P.

3. The St. Paul & Sioux City. This road is also a

part of the Chicago & Northwestern system, and received in land 1,000,010 acres. Reported sales, average price, $5.27 per acre. To St. P. & S. C.

4. The Chicago, St. Paul, Minneapolis & Omaha.—Received in land 999,983 acres. To C. St. P. & O.

In addition to above, the Chicago & Northwestern system received land grant aid in other states as follows:

In Michigan	622,271	acres
In Wisconsin	359,549	"
In Minnesota	727,940	"
In Dakota	443,313	"
Total	2,153,073	acres

5. The Burlington & Missouri River Railroad.—

Land grant in Nebraska	3,512,960	acres
Burlington & Missouri River in Iowa	948,643	"
Total	4,461,603	acres

To B. & M.

For the table showing the land grants to the respective railroads see exhibit. (p. 971.)

Looking back over the above tables of land grants, it is made to appear that substantially every mile of road within the State of Nebraska has been more than paid for by aid granted by the general government and by the states. The stockholders who own this railroad property represent a property which was practically *given* to them. We do not complain of this liberal grant of property. The grant was intended, as far as may be, to pay for the cost of construction, and it did substantially pay for all this railroad property. The stockholders have substantially nothing invested in this railway enterprise. They are the managers of this generous gift from the people who make up the government. So long as they manage the property and carry the product of the people at fair and reasonable prices, no one has just cause of

Why can stockholders complain if stock does not represent money that built the road.

complaint; but whereas this property is substantially gift property, the cost of transportation must be the corner stone upon which rates should be based. There is no justification left for these railway companies exacting a profit on local traffic of 100 per cent. over and above the cost of transportation. No complaint ought to be made when the people of Nebraska have only undertaken to reduce that local rate by 29½ per cent., still leaving the railway companies a net profit over the cost of transportation of about 70 per cent.

Land Grants State and Municipal Aid, Are Matters Which the Legislature and the Courts Should Take Into Account in Fixing Rates.

Circuit Court denied inquiry into Gov. aid.

The learned judge who wrote the opinion of the Circuit Court expressed the view that we should look only to the value of the property of the railroad company, without regard to whether all or any part thereof came to the company by government, state or municipal aid, and in that view compared the inquiry to that in condemnation proceedings. (64 Fed. Rep. 176).

"No inquiry is open as to whether the owner has received gifts from the state or individuals, or whether he has, as owner, managed the property well or ill, or so as to acquire a large fortune therefrom. It is enough that he owns the property, has the legal title; and so owning he must be paid the actual value of that property. The same general idea must enter into and control legislation of the kind before us."

In this we think the learned judge fell into error.

Railroads are built for the benefit of the public.

The carrying of commerce is a function of government.

"So far as the simple question of power is concerned, transportation of persons and property is equally with the carrying of letters and papers, a legitimate function of government. By reason of this, private corporations acting as com-

mon carriers are given the right to exercise the governmental power of eminent domain, and thus against the will of the owner to take his property for their public or *quasi* public uses." (64 Fed. Rep. 173.)

The *owner of real estate* which is sought to be condemned for public uses *has an absolute ownership in his property.*

He does not hold that property for public use nor for the public benefit.

He does not hold it subject to governmental regulation.

The two cases are clearly distinct.

The government has a right to build a railroad. It has a right to own a railroad.

WHEN THE GOVERNMENT DONATED LANDS FOR THE BUILDING OF RAILROADS IT WAS NOT MAKING THE DONATION FOR THE BENEFIT OF THE INDIVIDUAL OWNERS OF THE ROAD, BUT FOR THE BENEFIT OF THE PUBLIC.

Gov. aid was for benefit of public not for stockholders.

When the land grants were made to aid the construction of the Pacific roads they were not intended as a donation from the government to the Durants, the Dillons and the Huntingtons. It represented the interest of the public in that railway enterprise.

When the companies accepted these land grants the companies became to that extent *quasi* trustees for the public.

By reason of the land grants and other government aid the stockholders of the company were required to invest that much less money.

It may be true, in a sense, the stockholders would be entitled to earn a sufficient revenue to pay operating expenses and some interest upon their investment. But it is an entirely different question to say the company is entitled to earn enough money to pay to those stockholders an interest upon the whole value of the road, when half or two-thirds of that value came

from the government and the stockholders furnished less than one-third.

Whereas, the government in the first instance possessed the power of regulation of rates, and whereas, the building of the railroad was a matter of public enterprise, and whereas, the public contributed by government, state and municipal aid to the building of the road, the government would have a right to take into consideration such municipal, state and national aid in determining what should be a reasonable rate.

Any other principle would work gross wrong.

It would be to say that the people, who are the government, in the first place contributed to build the road, and must not only lose their contribution, but must pay freight rates to pay an interest upon the amount of that contribution, but which interest goes into the hands of the stockholders.

CAPITALIZATION.

The Railway Companies of Nebraska are Capitalized at Much More Than Their Actual Value or Their Actual Cost, and in Some Instances the Capitalization is Four Times as Great as the Value of the Property.

This fictitious capitalization of the railway company is not only unlawful, but is particularly forbidden by the constitution of Nebraska (Art. XI, Sec. 5):

Neb. Constitution declares fictitious stock void.

"No railroad corporation shall issue any stock or bonds, except for money, labor or property actually received and applied to the purposes for which such corporation was created, and all stock, dividends and other FICTITIOUS INCREASE of the capital STOCK or indebtedness of any such corporation shall be void."

State vs. A. & N. Ry. Co.

In *State vs. A. & N. Ry. Co.*, 24 Neb., 165, the court held that the issue of stock or of bonds without an actual con-

sideration was sufficient ground for the forfeiture of the franchise of the company.

"The attorneys for the defendant contend that Section 5, Article XI, of the Constitution, applies more particularly to stockholders. It has much broader scope, however. *It was intended to restrict the issue of stock and bonds to the actual consideration received.* One of the objects of the provision was to enable all parties to know the actual cost of all railroads within the state, so that the legislature in providing for taxing them and for regulating the charges for transportation of persons and property, may be enabled to so so advisedly, and pass laws which shall be just alike to the railway companies, the public and individuals. In any view of the case, therefore, the defendant's franchises are subject to forfeiture."

Under Above Case the Holder of Fictitious Stock no Right to Complain.

The peculiar force of the fraud upon the public resulting from fictitious capitalization is found quoted from the *Cyclopaedia of Political Science*, in *Cook on Stockholders* (Vol. 1, p. 41):

"A line from one point to another, say a distance of 100 miles is surveyed. It is ascertained that it will cost about $15,000 a mile to build, including acquisition of land, and about $5,000 a mile to equip; a total of $20,000 a mile. Application is then made for town and county aid, which aid is generally represented by investment in stock of the road. The first purpose is to give as little as possible in the way of value in return for such money aid, and it is therefore necessary to interpose between the stock and the property a sufficient number of mortgages to make prospective value of the stock of little or no value. A construction company is then organized, which takes the town and county aid as part of its capital, and the railway corporation, instead of making its contract on the basis of cash, issues to the construction company, say first mortgage bonds of $20,000 a mile, or possibly $25,000; second mortgage bonds of $20,000 a mile, and stock of an equal value, making a total capitalization of $65,000 a mile, instead of $20,000, at which the road could be

How fictitious capitalization created.

constructed. The construction company is composed gener ally, directly or indirectly, of the officers of the road an their friends, who built the road upon the basis of cash ob tained by negotiating through bankers the securities repre sented by the bond issues of the railroad company; the acquire the stock for little or nothing, and also frequently large proportion, if not the whole, of the second mortgage and in prosperous times they may succeed in building an equipping the road on the issue of the bonds secured by th first mortgage alone. By this system the road comes int existence laboring under the necessity to earn, over and abov operating expenses, interest on a funded debt about doubl the cost of the enterprise, and if possible to earn dividend on the stock beyond that sum."

Our whole difficulty in the state of Nebraska over trans portation lines and transportation rates grows out of the fa that each of the companies feels itself burdened with fictitious capitalization, upon which interest must be paid This is used as an excuse, or an attempted justification for th exaction of unreasonable and high freight rates. *Wipe ou fictitious capitalization of transportation lines, and we sett the whole transportation problem to the satisfaction of a people.*

THE CHICAGO, BURLINGTON & QUINCY.—The bill of com plaint alleges the capital stock of the Chicago, Burlington

Stock and bonds of C. B. & Q.

Quincy to be	$ 76,407,5
Bonded debt	123,963,6

The bill of complaint also alleges that this capitalizati should be apportioned as follows to the lines in Nebraska:

Capital stock	$29,583,1
Bonded debt	46,840,5
Total	$76,523,7

Mr. JAMES G. TAYLOR, of the B. & M., in his table repr senting the bonded debt of the Chicago, Burlington & Quin in Nebraska states: (pp. 587–589.)

Amount of mortgage on Nebraska mileage....$45,268,992.80
Amount of mortgage per mile..... ... 20,092.14

It is said in the answer, (pp. 48-49-50):

"*That between the years 1879 and 1880 the capital stock of the company was increased more than 70 per cent. or $23,408,740, for which the railroad company received no consideration; and that from the year 1880 down to 1893 the capital stock of the company has been increased from time to time nearly 40 per cent., or $21,995,200, and which said increasing of capital stock did not represent any cash received* by the complainant company, and was without consideration, and that the whole amount of stock issued and outstanding for which the company received no consideration (commonly known as watered stock) amounts to $45,403,940, being three-fifths of the entire stock of the company, yet the dividends paid from year to year, with but few exceptions, are from 8 to 10 per cent. on the entire stock outstanding of $76,408,500. And in this connection defendants aver that if the payment of cash dividends had been confined to the stock which actually represented cash invested in the railroad company for the construction and equipment of its lines of road, *that the net earnings would have paid a dividend annually of from 20 to 25 per cent. including interest upon the outstanding funded debt.* That, in addition to the cash dividends paid upon the outstanding stock from year to year, as hereinbefore set forth, that the company from time to time in addition thereto, unlawfully issued large quantities of stock which was distributed among the previous stockholders in the ratio of their previous holdings of stock by way of stock dividends or otherwise, but for which the company received no consideration; that the amount of stock so issued, as defendants are informed and believe, was and is as follows:

C. B. & Q. R. $45,403,940 fictitious stock.

C. B. & Q. pays dividend on this fictitious stock.

Earnings would pay 20 per cent on funded debt.

Date.	Per Cent.	Old Stock.	Dividend Stock.
1855, June 30.....	5	$ 2,911,810	$ 145,590
1855, Dec. 31.....	10	2,911,810	291,181
1856, Dec. 31.....	10	2,911,810	291,181
1864, May 25.....	11	6,571,140	722,825
1865, Oct. 31.....	20	8,376,510	1,675,302
1867, Sept. 15.....	20	10,399,010	2,079,802
1869, Mar. 15.....	10	13,825,025	1,382,502
1880, May 3..... (On capital)	20	54,413,197	10,882,630
1881, Jan. 3, (1879)...	66⅔	31,004,197	22,529,904
Total.....			$40,0009.26

ds issued by ay of divi- nd.

"Defendants say in addition to the foregoing named stock dividends that the complainant company, in 1873, issued a *dividend of twenty-five per cent.* upon its then outstanding stock *in mortgage bonds* upon the property of the complainant company."

lworth on ove table.

It appears in the testimony of W. A. Dilworth (p. 1110) that he prepared the above table setting forth the amount of dividend stock issued by the Chicago, Burlington & Quincy company, and that the table correctly sets down the amount of dividend stock, or watered stock, issued by that company in the form of dividends.

No witness was called in the behalf of the railway company to contradict this statement of Mr. Dilworth. In this regard it stands admitted that up to the year 1881 this company had issued in dividend stock.....$40,000,000.

mitted divi- end stock ued $40,000,- 0.

This amount of watered stock exceeded the amount of original outstanding stock on that date in the amount of about .....$9,000,000.

This amount of dividend, or watered stock, is more than one-half of the entire amount of outstanding stock at the present time.

WATERED CAPITALIZATION.—Taking the average bonded debt per mile as stated by Mr. Taylor.....$20,092.14

we have a bonded debt equal to the present valuation of the B. & M. lines in Nebraska, or a sum equal to what it would cost to reproduce the same lines.

How much of the whole amount of dividend stock, or watered stock.....$40,000,926

should be apportioned to the Nebraska lines is not stated, but *whereas* it does appear that more than one-half of the entire amount of stock is dividend stock, the stock apportioned to the Nebraska lines by Mr. Taylor.....$29,583,145

would include in it watered stock in the ratio of $40,000,000 to $76,000,000

Furthermore, whereas it appears that the mortgages upon the Nebraska line are equal to the entire value of the road, the whole amount of the stock apportioned to Nebraska lines .....$29,583,145 does not represent any money actually invested in the construction or equipment of the road.

Stock on mileage in Neb. does not represent capital invested $29,583,145.

Whereas, the Chicago, Burlington & Quincy company has at all times been paying interest on its bonded debt, and also a dividend upon the whole amount of its stock, such dividend ranging from 5 per cent. to 10 per cent. annually, it is apparent that the B. & M. Railway Company in Nebraska has been *earning sufficient money to pay a big rate of interest upon double the amount of money legitimately invested in its railroad property;* in other words, that railroad company has been earning sufficient money from its passenger and freight traffic to pay a good rate of *interest upon double the amount of money invested in its railway lines*, or a sum of money netting an interest from 10 to 15 per cent. annually upon the value of its property.

C. B. & Q. earns 10 to 15 per cent on value of road.

Chicago & Northwestern.—It is set forth in Exhibit to Answer in the Chicago & Northwestern case that the company is capitalized as follows:

Capitalized stock.....	$ 64,242,831
Bonded debt.....	114,235,500

Now the capital stock of this company has also been watered from time to time growing out of the consolidation of other companies and by the issuing of consolidated mortgages as will hereafter more particularly appear.

If the payment of cash dividends had been confined to the stock which actually represented cash invested by this railroad company for the construction and equipment of its lines of road, the net earnings would have paid a dividend annually

C. & N. W. earns 10 to 20 per cent on value.

from 10 to 20 per cent. upon its capital stock, including interest upon its funded debt.

ST. PAUL, MINNEAPOLIS & OMAHA.—The manner of increasing its capital stock by the consolidation scheme is set forth in the answer as follows:

"And these defendants further answering say that at the time of the consolidation of the Chicago, St. Paul, Minneapolis Railway Company, with the Northern Wisconsin Railway Company, that the capital stock of said constituent companies was as follows, respectively: Chicago, St. Paul & Minneapolis Railway Company, $5,000,000; Northern Wisconsin Railway Company, $2,000,000; but that the consolidated company immediately increased the capital stock at the time of the consolidation as follows:

P. M. & O. R. Preferred stock	$ 9,615,000
Common stock	13,565,200
Total	$23,180,200

and which said increase of capital stock was without actual consideration and further say that since said date the said company has further increased its stock, until now it claims and pretends to have issued and outstanding:

Preferred stock	$12,646,833
Common stock	21,403,293
Total	$34,050,126

* * * * * * *

"Yet the said railway company has been for a long series of years earning sufficient money to pay all its operating expenses, together with interest upon its large funded debt, and a dividend of 6½ per cent. upon its preferred stock, all of which more particularly appears by Exhibit "C," hereto attached. And in this connection these defendants further aver that if the payment of cash dividends had been confined to the stock which actually represents cash invested in the railroad company for the construction and equipment of its lines of road, that the net earnings would have paid a dividend annually from 20 to 25 per cent. including interest upon the outstanding funded debt."

The correctness of the above statement was verified by

the evidence of Mr. Dilworth and is not contradicted in the record, so that the above statement stands as admitted facts.

FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD COMPANY.—The manner of increasing the capital stock of the Chicago & Northwestern in connection with the Fremont, Elkhorn & Missouri Valley Railroad Company is set forth in the answer as follows (p. 152): F. E. & M. V.

"That the time of the original incorporation of said company its capital stock was limited to $4,000,000, yet now so it is that the capital stock has been increased from time to time until the total amount issued and outstanding is $30,370,000, and that the whole amount of cash realized by the said railroad company on account of said issues of stock did not exceed $690,000, so that it would appear, and that these defendants upon information and belief aver, that more than $29,000,000 of said stock, or nearly the entire amount thereof, was issued and distributed to persons by way of a bonus upon construction contracts."

The Chicago & Northwestern has at all times paid the interest upon its entire funded debt, and has also paid a dividend upon its stock as set down in Exhibit "B" to the answer.

EARNINGS OF THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA.—To the answer of the Chicago, St. Paul, Minneapolis & Omaha Railway Company is attached an exhibit showing the earnings of that road from 1889 to 1893, inclusive, which shows an increase of earnings from year to year, as follows: Increase of earnings of C., St. P., M. & O. R.

1889	$692,114.66
1890	753,939.52
1891	785,999.61
1892	919,737.69
1893	954,665.21

The above statement shows such an annual increase in earnings that we see no reason why this company should complain of a reasonable reduction of its local tariff.

THE UNION PACIFIC RAILWAY COMPANY.—Mr. Mink

states the mortgage debt of the Union Pacific, December 3
last to be (p. 742)..... $134,598,461.4
The total funded and unfunded liability..... 145,236,606.7
Capital stock..... 60,868,500.0

P. Ry. liabil-
y.

Total liability..... $206,105,106.7
Liability per mile..... 109,000.0

The amount properly to be apportioned to the main lin
of the Union Pacific from Omaha to Ogden is much greate
than $109,000 per mile, by reason of the fact that the origina
mortgages which were upon the line from Omaha to Ogde
were greater than the amount of mortgages per mile upon th
Kansas division.

From what we have said in an earlier part of this brie
as to the value of the Union Pacific property in the state o
Nebraska, it appears that the bonded debt alone of the Unio
Pacific is more than three times the actual value of the prop
erty, and that the capitalization of the Union Pacific is mor
than four times the actual value of the line in Nebraska.

ded debt of
P. R. 3 times
actual value.

Pattison committee says: (p. 1163.)

"The Union Pacific (1,038.68 miles) was built for $38,
824,000, and the company issued bonds and stocks as follows

First mortgage bonds	$27,237,00
United States bonds	27,236,51
Land grant bonds	9,224,00
Income bonds	9,355,00
Stock	36,762,30
Total	$109,814,81
Cost of construction	38,824,00

titious capi-
lization $70,-
812.

Fictitious capital..... $ 70,990,81

"One thing is evident: After allowing for discount, th
road was built for less than the proceeds of the first mortgag
and government bonds, which had a face value of $54,465,512
the builders taking as profit part of the proceeds of the sale o
those bonds, as well as the income bonds, the land grant bond
and the stock, and charging up on the books of the company
as cost of construction $109,814,812."

The Capitalization of the Railway Companies Cannot Properly be Made the Basis of Determining the Value of the Property or the Basis of the Tariff Rate the Company is Entitled to Charge.

According to the testimony of the expert engineers who have beeen examined in this case, $20,000 per mile is a good round valuation for the cost of reproducing any of the said properties. That point we have heretofore sufficiently argued.

It also appears that there is no substantial difference in the cost of building any of the roads in the state. In other words, the roads all run through a comparatively level country and one road is substantially as good as another, varying only in the ballasting and quantity of equipment, yet the capitalization of the respective companies differs widely: Exhibit 23, (p. 1113) shows the capital stock per mile, the funded debt per mile, and total capitalization per mile of the various roads as follows:

Table showing capitalization per mile.

	Capital Stock per Mile.	Funded Debt per Mile.	Total per Mile.
C., B. & Q.	$14,439	$22,034	$36,473
C., St. P., M. & O.	25,103	17,504	42,608
F., E. & M. V.	23,352	16,238	39,590
U. P. Ry.	33,318	70,468	103,786
O. & R. V.	5,021	12,324	17,345
St. J. & G. I.	18,322	34,768	53,060
K. C. & O.	22,769	14,007	36,007
Mo. Pacific.	44,746	48,462	93,208
Pacific R. R. in Neb.	15,010	15,000	30,010
K. & B. H.	14,175	13,496	27,625
C., R. I. & P.	16,822	19,545	36,368

It will be noted that the capitalization varies from $17,345 per mile on the Omaha & Republican Valley in an increasing ratio up to 103,786 per mile on the Union Pacific. There exists the same degree of variance in the funded debt per mile, the lowest being the Omaha & Republican Valley, $12,334 per mile, and the highest the Union Pacific $70,468

per mile. *The reasons why this bonded debt or capitalization should not be made the criterion of what shall constitute a reasonable tariff are as follows*:

a. The funded debt and the capitalization are in many places out of all proportion to the cost of reproducing or the valuation of the property.

b. If the funded debt or capitalization is a criterion, then the Union Pacific would be entitled to charge a tariff of 300 per cent, greater than the Chicago, Burlington & Quincy, and the Chicago Burlington & Quincy would be entitled to charge a tariff 200 per cent. greater than the Omaha & Republican Valley, and so through the list of roads.

c. If the funded debt or capitalization is to be made the criterion for fixing tariff rates, then all that the railways would need to do to justify an increase of tariff rates would be to increase its funded debt, or to water its capital stock. Such a process would put the people who use these public highways absolutely at the mercy of the men who manage the capitalization of the railway companies.

capitalization criterion of rates—these rates must radically differ on different lines.

d. Furthermore, the railway companies would thus be possessed of the power to have it annually adjudged and decreed that any maximum freight law was unreasonably low, by an annual increase of watering of its capital stock. This would give the railway companies such power as would make them absolute masters of the people.

e. Suppose the state of Nebraska, out of state funds, should build and own a road across the state, parallel to and a competitor with the Union Pacific line, which road should not cost the state more than $25,000 per mile, in such a case it would be agreed that a reasonable tariff rate over said road would be one that would earn for the state a reasonable rate of interest on the investment of $25,000 per mile.

every change of capitalization would change rates.

Is it to be contended that the Union Pacific would be en-

titled to *charge a tariff four times as high*, or one that would earn a sufficient revenue to pay interest on its capitalization of $103,000 per mile? Common sense answers *no*.

f. Suppose a road was constructed across the state by a company which used its own money to pay for the construction of the road, so that its capital stock represented the actual cash going into the road, on a basis of $20,000 per mile, so that there was no mortgage upon the road, which said road was a competitor of the Union Pacific. It certainly would not be insisted that the said road had a right to charge a tariff rate to pay interest upon its mortgage debt, because *it has no mortgage debt*. A tariff rate on such road would be reasonable and would pay interest upon the *actual investment*.

Is not a tariff rate unreasonably high when it is exacted by the Union Pacific under the pretense that the same is necessary to pay interest, not upon money invested in the road, but upon a mortgage debt of $70,468 per mile?

g. There is only one true rule to go by, and that is that railroad property must be valued, as all other kinds of property are valued, *at what it is worth*, or what it would cost to reproduce the road, *or one similarly situated*. A mortgage debt is not, in any sense of the term, admissable to prove the value or the property.

True criterion must be the actual value of road.

The bondholder has no more right to fix the railroad tariff than a man who owns a mortgage on a building would have to fix the rent which a tenant shall pay, or a man who owns a mortgage upon a farm in Nebraska to fix the price of wheat in Liverpool.

Every Railway Bond Should be Read as if it Had Embodied in it as a Part Thereof the Proviso that Tariff Rates Should be Reasonable and not Exorbitant, and the Government Reserves the Right to Control and Regulate Such Rates.

It must be a confessedly admitted proposition that prop-

erty which is devoted to public use is subject to regulation by the government, state or federal, and that rates and charges for public service should be reasonable and not exorbitant.

LORD HALE applied the principle to common ferries, and said they could "take but reasonable toll" and were liable to a fine for doing otherwise. (*De jure Maris, I. Harg. Law. Tracts, 6*).

Lord Hale applied it to Wharves and Wharfingers, and said "in that case there cannot be taken arbitrary and excessive duties, and neither can they be enhanced to an immoderate rate." (*De Portibus Maris, I Harg, Law Tracts 78*).

Lord Kenyon applied the same principle in *Bolt vs. Stennett*, 8 T. R. 606.

Lord Ellenborough applied the same principle to warehouses and said such duties must be performed "on reasonable terms." (*Aldnutt vs. Inglis*, 12 East 527).

SUPREME COURT OF ALABAMA: "Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turnpike roads and other kindred subjects. (*Mobile vs. Yuille*, 3 Ala. N. S. 140).

COMMOM CARRIERS. It was applied to common carriers by Act of Parliament in the time of William and Mary. (3 Stat. at Large, Great Britain, 481).

U. S. SUPREME COURT. This court has recognized the same principle of law from *Munn vs. Illinois*, (94 U. S. 113), and *C. B. & Q. Ry. Co. vs. Iowa*, (94 U. S. 155), and *C. M. & St. P. Ry. Co. vs. Ackley*, (94 U. S. 179), down to the *Railroad Commission Cases*, (116 U. S., 307), and from *Wabash Ry. Co. vs. Illinois*, (118 U. S. 455-457), and *Chicago etc. Ry. Co. vs. Minnesota*, (134 U. S. 418), down to *Chicago etc. Ry. Co. vs. Wellman*, (143 U. S. 339), and from *Reagan*

vs. Farmers Loan & Trust Company (154 U. S. 362) to *St. L. & San Francisco Ry. vs. Gill* (156 U. S. 649.)

It is the law that every man who buys a railway bond, buys it subject to the authority of the state to regulate local rates, and subject to the right of the general government to regulate interstate rates.

This is a law of which the purchaser of a bond is bound to take notice of, for it is a law as old as the English speaking race.

By what right, therefore, can a bondholder say that the rates must be high enough and the income of the road great enough to pay the interest on such bonds and to that extent set at defiance the will of the legislature?

To give to the bondholders such power is to place them above the constitution.

It is under the constitution that railway charters are granted, but in the same constitution is reserved the right of the legislature to regulate the tariff rates. A bondholder can have no rights except in subordination to the constitution.

The Owners of Watered Capitalization Have no Right to be Heard as to What Shall Constitute a Proper Maximum Freight Rate.

Excess in Earnings Should be Held as a Trust Fund for Public or to Meet Deficits, and not Made Basis for Stock or Bond Dividends.

a. The owners of such capitalization do not represent anything legitimately invested in the road.

b. To permit a railway company to issue bonds by way of dividends to its stockholders, or to issue dividend stock to its stockholders is unjust and unlawful. Such a transaction

cannot be justified upon the suggestion that the railway prop
erty has increased in valuation.

c. The railway companies had no right in the fir
instance to charge such tariff rates as would produce this u
warranted income.

d. If during a prosperous season when traffic shall b
great an excessive revenue is realized, that surplus should b
held as a trust fund for the benefit of the people to the exte
that it should be a reserve fund to meet the deficiency arisi
from an unfortunate season of business.

Excessive earnings should be held as trust fund.

e. To permit the railway company to divide such surpl
earnings in the form of dividend bonds or dividend stocks is
concede to the railway companies the right thereby to dema
a higher tariff for the succeeding year, so as thereby to co
pel the people who use the road to pay a tariff rate that wou
pay interest on this surplus fund so dividend, as divided bon
or dividend stocks. The injustice of this is apparent upon t
mere suggestion.

When stock dividends are issued then earnings are increased to pay interest thereon

f. The only reasonable way to deal with the railwa
tariff is to have it so fixed to pay operating expensas and
reasonable rate of interest upon the sum of money legitimate
invested in the railroad, or a reasonable rate of interest upo
the valuation of that property.

g. Neither will it do to make the valuation of the railwa
property dependent upon the income of the road, because
one line of road should be so fortunately situated with refe
ence to the centers of trade, as to receive a large income a
nually, a valuation so estimated could be made a justificati
for such a road to claim the right to establish a high tariff rat
so as to yield an income to pay interest upon such high valu
tion after the income of that road should otherwise be deplet
by competing lines. By way of illustratson: If the valu
tion is to be fixed by previous net earnings then the Ne

Competing lines N. Y. Central and West Shore.

York Central and the West Shore road, each running practically parallel with each other from New York to Buffalo, would be entitled to charge such tariff rates as would have continued to yield to the New York Central such revenue as would have paid interest upon the valuation of the New York Central, fixed or based upon its previous earnings.

h. The logic of the argument would lead to the position that the state could not grant a charter to construct competing lines, as such competition might tend to cut off the revenue of the first roads, and so operate to confiscate their revenues.

Reduction Upon the Entire Business of the Companies.

These suits are brought by stockholders of the respective railway companies. The rights of the complainants, therefore, are only affected to the extent that the entire revenue of the respective railway corporations may be effected by the enforcement of the law.

We must look next, therefore, to the effect that would be produced upon the entire revenue of the railway companies by the enforcement of the Maximum Freight Law. That estimate, as to the CHICAGO, BURLINGTON & QUINCY company, *is only one and three tenths per cent.*, and upon the CHICAGO & NORTHWESTERN system *three-tenths of one per cent.*

Rights of plaintiffs are only effected as income of entire road is reduced.

As the ratio of local business upon the Union Pacific line is less than upon the other companies, the amount of reduction upon the Union Pacific system would be less than that upon the Chicago & Northwestern (p. 933).

"Q. You may state whether you know the amount of reduction which would be made upon the income of the Chicago, Burlington & Quincy Railroad Company, by which I mean what would be the percentage of reduction upon the entire income of that road from freight traffic by the enforcement of the law in controversy?

"A. I have made an estimate of that, and it comes *one and three-tenths per cent.*

"Q. Have you made a computation of the percentage reduction which would be brought about upon the total rever of the Chicago & Northwestern system by the enforcement the law in controversy?

"A. Yes, sir.

"Q. You may state what such reduction would be?

"A. *Three-tenths of one per cent.*

It will be observed that the per cent. of reduction in N braska upon the Union Pacific is but 2.2 per cent., while reduction upon the Fremont & Elkhorn and the Chicago, Paul, Minneapolis & Omaha (the two last named compan being a part of the Northwestern system) is 4.7 per ce The result is that the *Union Pacific* has the *least cause complain* of any of the companies, as the percentage of red tion upon its earnings is less than one-half the reduction up the Burlington and the Northwestern system.

Total Amount of Reduction Compared to the To Earnings of the Companies.

Total earnings of U. P. R. $46,573,295.

According to the table of Mr. Mink, (p. 719) the total income of the Union Pacific system for the year ending December, 31, 1892, was.....$46,573,295

Amount of reduction on U. P. R. $117,487.

The reduction upon the Union Pacific main line in Nebraska by the enforcement of the Maximum Freight Law, allowing the tonnage to remain the same according to the table of Mr. Dilworth (p. 932) would be only.....$ 117,487

The stockholders who have brought these suits in bel of the Union Pacific are put in the attitude of complaining the loss of $117,000 from the general revenue of that compa Why? What is this $117,487 compared to the entire ann income of the Union Pacific system. It is not one-thir the amount of money which the Union Pacific company g

by way of rebates to the Smelting company in Omaha within a period of three years.

The Union Pacific company gives away more money than that every year, by way of favoritism and accommodation, about which nobody complains. Why, this $117,000 a year would not pay the expenses of hauling the private cars of the moneyed magnates who ride back and forth over that road every year, and yet the stockholders do not complain of these things. Why should they complain of the people, who simply ask that they shall be granted individual justice?

THE CHICAGO, BURLINGTON & QUINCY SYSTEM.—

The annual earnings of the Chicago, Burlington & Quincy system	$27,916,128
The total amount of reduction by the Maximum Freight Law on the Burlington & Missouri River in Nebraska would be	365,175
The total earnings of the CHICAGO & NORTHWESTERN system	27,793,674
The reduction on the CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA would be	36,294
On the FREMONT & ELKHORN	99,310

C. B. & Q. tot earnings $2 916,128.

Reduction $365,1

THE EFFECT UPON THE STOCKHOLDERS.—The effect of the enforcement of the Maximum Freight Law of Nebraska upon the financial income of the stockholders of these respective railway companies *is so infinitesimally small* that you could not see it with a microscope. The Union Pacific Company is stocked for sixty millions of dollars. *What is $117,487 compared to sixty millions?*

The Chicago, Burlington & Quincy is stocked for $76,407,500. What is $365,175 to seventy-six millions?

The Chicago & Northwestern is stocked for $64,242,831. What is $135,604 to sixty-four millions?

MAXIMUM RATE GREATER THAN AVERAGE INCOME.

The Amount of Tariff Allowed by the Maximum Freight Law Will Yield to the Railway Companies a Greater Income Than the Average Amount Now Received by the Railway Companies for the Transportation of Freight.

The respective railway companies have been in the habi of making annual reports to the State Board of Transporta tion. In these reports is set down, among other things, th following:

1. The average distance haul of one ton.

2. Average amount received for each ton of freigh hauled.

Mr. Dilworth has prepared a set of tables showing:

a. Average distance haul of one ton.

b. Average amount received for each ton of freigh hauled: as shown by the respective roads for the several year 1891, 1892 and 1893, and has made a computation showin classifications of freight, and the amount that would be re ceived under the Maximum Freight Law for hauling freight like distance.

By way of illustration we quote the table applying t the B. & M. railway for the year 1893:

"The Burlington & Missouri River Railroad Company i Nebraska, in its annual report for the year ending June 3(1893, filed with the State Board of Transportation, amon other things reported as follows:

Average amount received by B. & M. 1 ton 160 miles $2.12.

" 'Average distance haul of one ton 160 miles.'

" 'Average amount received for one ton of freight $2.12

"Taking this as a basis, the following table shows th

amount permitted to be charged by House Roll No. 33 for carrying the several classes of freight upon the same railroad for the same distance, viz: 160 miles upon each 100 pounds and each ton of freight so carried: (p. 1660.)

1893.

CLASSIFICATION	Rates for 160 miles per 100 pounds.	Amount of charge for hauling 1 ton 160 miles
1	.44	$8 80
2	.40	8 00
3	.36	7 20
4	.28	5 60
5	.24	4 80
A	.24	4 80
B	.15	3 00
C	.14	2 80
D	.10	2 00
E	.065	1 30
Wheat, etc	.13	2 60
Corn, etc	.11	2 20
Lumber, etc	.10	2 00
Salt, etc	.122	2 44

The right hand column shows the amount that might be charged under the Maximum Freight Law for hauling one ton 160 miles. It will be observed that in each classification the amount so allowed by the Maximum Freight Law, with two exceptions is greater than the average amount received by the railway company for hauling one ton of freight the same distance, and in some instances many times as great.

The present existing rates having been established by the respective railway companies, the railway companies cannot be heard to say that they operate as a confiscation of their property.

It was claimed by Mr. Mink in behalf of the Union Pacific

Company, that the Omaha & Republican Valley road was un profitable. We present a like table for that road for the yea 1893 :

"The Omaha & Republican Valley Railroad Company, in its annual report for the year ending June 30, 1893, filed with the State Board of Transportation, among other things reporte as follows :

R. V. R. average received for ton 62 miles 1.18.

" 'Average distance haul of one ton 62 miles.'

" 'Average amount received for each ton of freight $1.18.

"Taking this as a basis the following table shows th amount permitted to be charged by House Roll No. 33 fo carrying the several classes of freight upon the same railroa for same distance, viz ; 62 miles upon each 100 pounds an each ton of freight so carried : (p. 1672.)

1893.

CLASSIFICATION.	Rates for 62 miles per 100 pounds.	Amount of charge fo hauling 1 to 62 miles.
Under new law.		
1	.26	$5.20
2	.26	4.40
3	.17	3.40
4	.14	2.80
5	.11	2.20
A	.11	2.20
B	.09	1.80
C	.06	1.20
D	.07	1.40
E	.04	.80
Wheat, etc	.08	1.60
Corn, etc	.07	1.40
Lumber, etc	.07	1.40
Salt, etc	.055	1.10

It will be observed that the last column, which repr sents the amount permitted to be charged under the Maximu Freight Law for the haul of one ton 62 miles, with one sing

exception, is greater than the average amount received by that company for hauling one ton 62 miles, and in many instances is several times greater.

The tables for all the roads for the years named will be found in the evidence, pages 1658 to 1678 inclusive. The two tables selected are a fair average of all the tables for the several roads for the respective years. No witness was called by the complainants to question the correctness of these statements. In this record they stand admitted to be true in fact.

These tables furnish an unanswerable argument to the plea of the complainants that the enforcement of the present Maximum Freight Law would operate as a confiscation of the railway properties.

The Enforcement of the Maximum Freight Law May Not Produce Any Actual Reduction in the Income ofthe Companies.

This law of which these stockholders of the railway companies complain, has never been put into operation. Complainants, therefore, are bound to rest in the field of speculation and uncertainty, as to whether or no there would be the small diminution of income as set down in the statement.

Reduction of rates always increases the amount of traffic. The converse of the proposition is equally true, that higher tariffs always reduce the amount of traffic. That is a proposition that no railway traffic manager was ever heard to dispute. While, therefore, it stands as an admitted proposition that increased tariff rates diminish traffic, reduced tariff rates always increase traffic. The revenues of the railway companies are never, therefore, diminished unless the reduction in tariff rates should be so great as to be out of proportion to the increased amount of traffic.

Wait Until the Law is Tested.

What the railway companies in this state should have done was to wait until the effect of this law was tested. Then if they had reason to complain, to come before the court with a knowledge based on experience. We stand here protesting that neither the railway companies nor the courts have a right to adjudicate in advance that the enforcement of this law would produce a reduction in revenues, when the railway companies *do not know it, and the court can't know it.*

Mr. Justice BREWER said, in *Chicago, etc., Railway Comprny vs. Wellman*, 143 U. S., 343:

"Must it be declared as a matter of law, that a reduction of rates necessarily diminishes income? May it not be possible —indeed, does not all experience suggest the probability— that a reduction of rates will increase the amount of business, and therefore the earnings?

At any rate, must the court assume that it has no such effect; and ignoring all other considerations, hold as a mattnr of law, that a reduction of rates necessarily diminishes the earnings?"

The decree entered by the Circuit Court did not declare the law to be either invalid or unconstitutional.

The decree operates only as a temporary suspension of the law.

It reserves the right to the State Board to transportation to hereafter apply to the court to set aside the injunction when conditions have so changed that the rates fixed in the act may be deemed reasonable rates, or yield to said companies reasonable compensation.

"It is further ordered, adjudged and decreed that the defendants members of the Board of Transportation of said state may hereafter when the circumstances have changed so that the rates fixed in said act shall yield to the said companies reasonable compensation for the services aforesaid, apply

to this court by supplemental bill or otherwise as they may be advised, for a further order in that behalf."

There are two objections to such form of decree:

1. Neither the opinion of the court nor the decree are sufficiently explicit to advise the Board of Transportation how to ascertain when the rates shall be reasonable rates, nor what change in conditions would justify the enforcement of the rates set down in the law. The opinion is indefinite and uncertain as to what would constitute reasonable rates.

If the legislature of this state should pass a new act, by what criterion should it be guided?

Should the legislature take into account the actual value of the railway properties, or should they take into consideration the capitalization of the roads? We have urged that the profit upon local business is not the true criterion, and that fictitious capitalization should not be considered.

Before the legislature can intelligently pass any act, or the state Board of Transportation intelligently apply to the court for a modification of the decree, this question should be definitely settled.

2. The decree borders on the line of legislation. It is a decree to the effect that the law is valid, yet in the opinion of the court it is not expedient to enforce it now, but that it may be expedient to enforce it hereafter when conditions are changed; therefore the law shall stand, but its enforcement is temporarily suspended.

This is in the line of the extraordinary prerogative exercised by the King of England in suspension of acts of parliament which brought on the revolution, overthrew the monarchy and established the protectorate under Cromwell.

The President may pardon a prisoner, but he cannot issue a pardon with the condition that the prisoner shall go back to

the prison house if his conduct shall not be satisfactory to the pardoning power.

The Governor may veto a law, but he cannot do so coupled with the condition that the law may thereafter be enforced, if it should become his opinion, or the opinion of some succeeding executive, that the enforcement has become expedient.

It is not for the courts to say that an act of the Legislature shall be suspended because unwise today, but may be enforced tomorrow, if then expedient.

Such questions are for the law-making power and do not belong to the judiciary.

Power to suspend the law attaches only to the executive in the declaring of martial law, under the extraordinary circumstances of rebellion of war.

ADEQUATE REMEDY AT LAW.

Section 5 of the Maximum Freight Law Provides for a Judicial Procedure for Raising the Rates if the Rates Prescribed by the Act are Unjust and Unreasonable.

"Sec. 5 Whenever any railroad company or companies in this state shall, in a proper action, show by competent testimony that the schedule of rates prescribed by this act are unjust and unreasonable, such railroad or railroads shall be exempt therefrom, as hereinafter provided. All such actions shall be brought before the Supreme Court in the name of the railroad company or companies bringing the same and against the State of Nebraska, and upon the hearing thereof, if the court shall become satisfied that the rates herein prescribed are unjust in so far as they relate to the railroad bringing the action, may issue their orders directing the Board of Transportation to permit such railroad to raise its rates to any sum in the discretion of the board, provided, that in no case shall

the rates so raised be fixed at a higher sum than that charged by such railroad on the first day of January, 1893."

This section provides a way, if the rates therein are found to be unjust, to restore the tariff rates voluntarily fixed by the companies, and of which rates they make no complaint.

It is a principle of law, so elementary as to need no argument, that a court of equity will not exercise its power of granting injunctions against the enforcement of a law classifying freight and fixing maximum tariffs when the railway companies may, by a proceeding at law under the provisions of the act itself, have an inquiry into the question whether the rates are unjust and unreasonable.

The present inquiry is whether the rates are unjust and unreasonable.

It is an inquiry upon the equity side of the court in advance of the rates being put into practical operation.

It is an appeal to the Chancellor upon an averment in the pleadings that the railway companies have no other adequate remedy.

The section of the act above quoted seems to us a complete answer to this averment in the bills. This section takes from this court its equity jurisdiction, and the bills should be dismissed for this reason alone.

For the reasons above stated the case is clearly distinguishable from *Chicago &c. Railway Company vs. Minnesota*, 134 U. S., 418, and other like cases.

The Maximum Rates Complained of are Established by an act of the Legislature and Therefore Distinguished from the Cases Where the Rates Have Been Established by a Commission.

It is Doubtful Whether Under any Circumstance the

Court Will or Should Overturn the Judgment o the Legislature Upon the Reasonableness o Rates.

In all the adjudications upon the rate question and kin dred subjects from the time of *Munn vs. Illinois* down t *Chicago, &c., Railway Company vs. Minnesota*, the genera opinion prevailing in the profession was that the reasonable ness of such rates, when once established, by act of the leg islature were not open to further inquiry.

The decision in the Minnesota case gave a new turn t affairs. In that case the court held that it would inquire int the reasonableness of the rates. There were two distinctiv features in that case.

1. The rates were established by a commission and no by an act of the legislature.

2. The manner in which the commission fixed the rates cut off the right of the railway companies to be heard upo the reasonableness of the rates.

That was not an adjudication that the court would inquir into the reasonableness of the rates when fixed by an act o the legislature.

Mr. Justice BLATCHFORD in his opinion in the case o *Budd vs. New York*, 143 U. S., 517, in construing the Minne sota case, said in effect that it was not an adjudication that th court would inquire into the reasonableness of the rates whe established by an act of the legislature. The tenor of th opinion is that in such a case the court would not inquire int the reasonableness of the rates. Upon this point Justic BLATCHFORD said :

"It is further contended that, under the decision of th court, in *Chicago, &c., Railway Co. vs. Minnesota*, 134 U. S 418, the fixing of elevator charges is a judicial question as t whether they are reasonable or not; that the statute must pe

mit and provide for a judicial settlement of the charges, and that, by the statute under consideration, an arbitrary rate is fixed, and all inquiry is precluded as to whether that rate is reasonable or not.

"But this is a misapprehension of the decision of this court in the case referred to. In that case the legislature of Minnesota had passed an act which established a railroad and warehouse commission, and the Supreme Court of that state had interpreted the act as providing that the rates of charges for the transportation of property by railroads, recommended and published by the commission, should be final and conclusive as to what were equal and reasonable charges, and that there could be no judicial inquiry as to the reasonableness of such rates. A railroad company, in answer to an application for a mandamus, contended that such rates in regard to it were unreasonable, and, as it was not allowed by the State Court to put in testimony in support of its answer on the question of the reasonableness of such rates, this court held that the statute was in conflict with the constitution of the United States, as depriving the company of its property without due process of law and depriving it of the equal protection of the laws. *That was a very different case from the one under the statute of New York in question here, for in this instance the rate of charges is fixed directly by the legislature.* (See *Spencer vs. Merchant*, 125 U. S., 345-356.) What was said in the opinion of the court in 134 U. S. *had reference only* to the case then before the court, and to charges fixed by a *commission* appointed under an act of the legislature, under a constitution of the state which provided that all corporations, being common carriers, should be bound to carry on equal and reasonable terms,' and under a statute which provided that all charges made by a common carrier for the transportation of passengers or property should be 'equal and reasonable.'

"What was said in the opinion in 134 U. S. as to the question of the reasonableness of the rate of charge being one for judicial investigation *had no reference to a case where the rates are prescribed directly by the legislature.*"

See also *Brass vs. North Dakota, ex rel. Stœser*, 153 U. S., 391.

In the Texas case the freight rates were fixed by a com-

mission and not by an Act of the Legislature. Hence the Texas case would bear a closer similarity to the Minnesota case than to the Nebraska case. *Reagan vs. F. L. & T. Co.*, 154 U. S. 362.

QUESTION OF FACT, NOT OF LAW.

The Question Whether the Rates Fixed by the Maximum Freight Law Are Unjust or Unreasonable is Not a Question of Law, but a Question of Fact.

There is no principle of law involved in this case about which there can be any serious discussion. The controversy is wholly over a question of fact. To prove that we need but point to this large record of evidence which is wholly devoted to a statement of facts.

In the Minnesota case above referred to Mr. Justice BRADLEY said:

"It is stated that all charges must be reasonable and that none but reasonable charges can be exacted; and it is urged that what is a reasonable charge is a judicial question. *On the contrary, it is pre-eminently a legislative one, involving considerations of policy as well as renumeration, and is usually determined by the legislature by fixing a maximum of charges in the charter of the company, or afterwards, if its hands are not tied by contract.*"

A court of equity will not grant an injunction upon a disputed state of facts where the evidence is equally balanced or preponderates in behalf of the defendant. The complainants, to succeed, must have a clear case. They must satisfy the mind of the Chancellor that they are certainly entitled to the relief sought, or the injunction must be denied.

"It is always a delicate thing for the court to make an issue with the legislative department of the government, and they should never do so, if it is possible to avoid it." (Justice BRADLEY in the Minnesota case.)

To say that an act of the Legislature establishing tariff

rates is always subject to be inquired into and set aside by the courts as unjust and unreasonable is to judicially declare that the Legislature is simply a suggester of rates and that the court is the arbiter.

What becomes of the constitutional provision of Nebraska which confers the power of establishing rates upon the legislature?

It has not conferred that power upon the Court.

The constitution of the United States has conferred upon Congress the power to regulate commerce between the states. Suppose Congress should establish interstate rates, would anybody contend that Congress should be a mere suggester, and that the Court would have the power to abolish the rates so enacted by Congress? No!

Is there any distinction between the two classes of cases? No!

By reason of the injunction granted in this case, the railroad companies have already suspended for three years the operation of this law, to the aggrandisement of themselves and to the detriment of the people. It is time to call a halt and let the law be tested by actual experience.

If the law had gone into operation at the time when this suit was brought and had remained in operation from that time to the present, such operation would have bred such facts and worked such results as would have enabled the railway companies, and the people, and the courts, to judge advisedly whether it was a wise or an unwise law.

As it has been, the railway companies have remained the masters of the situation, and the people are standing as supplicants at the bar of this court, asking for speedy relief.

Let their prayer be heard.

JOHN L. WEBSTER,
Counsel for Appellants.

IN THE SUPREME COURT

OF THE UNITED STATES.

ARTHUR S. CHURCHILL, ET AL.,
Appellants,
v.
OLIVER W. AMES, ET AL.,
Appellees.

ARTHUR S. CHURCHILL, ET AL.,
Appellants,
v.
GEORGE SMITH, ET AL.,
Appellees.

ARTHUR S. CHURCHILL, ET AL.,
Appellants,
v.
HENRY L. HIGGINSON, ET AL.,
Appellees.

APPELLANTS' BRIEF.

Appellants contend:

First: That the several states have the right to fix, either directly through an act of the legislature or indirectly through a commission, reasonable maximum freight and passenger rates upon traffic wholly within their borders. Chicago, Burlington & Quincy R. R. vs. Iowa, 94 U. S. 155; Peik vs. Chicago & Northwestern R. R., 94 U. S. 164; Chicago, Milwaukee &

St. Paul R. R. vs. Ackley, 94 U. S. 179; Winona & St. Peter R. R. vs. Blake, 94 U. S. 180; Illinois Central R. R. vs. Illinois, 108 U. S. 541; Railway Commission Cases, 116 U. S. 307; Wabash, St. Louis & Pacific R. R. vs. Illinois, 118 U. S. 557; Dow vs. Beidelman, 125 U. S. 680; Covington etc. Turnpike Co. vs. Sanford, 164 U. S. 578.

Second: That, as a general rule, the power of the courts to suspend the enforcement of a schedule of rates fixed by a state legislature or by a railway commission can only be invoked when such rates yield an income so small as to leave absolutely nothing above operating expenses Chicago, Milwaukee etc. R. R. vs. Minnesota, 134 U. S. 418; Chicago & Grand Trunk R. R. vs. Wellman, 143 U. S. 439; Reagan vs. Farmers Loan & Trust Co., 154 U. S. 362; St. Louis & San Francisco R. R. vs. Gill, 156 U. S. 649; Covington etc. Turnpike vs. Sanford, 164 U. S. 578.

In Chicago & Northwestern R. R. vs. Dey, 35 Fed. Rep. 878, Mr. Justice Brewer said: "Counsel for complaint urge that the lowest rates the legislature may establish must be such as will secure to the owners of the railroad property a profit on their investment at least equal to the lowest current rate of interest, say three per cent. Decisions of the Supreme Court seem to forbid such a limit to the power of the legislature in respect to that which they apparently recognize as the right of the owners of the railroad property to some reward, and the right of judicial interference exists only when the schedule of rates established will fail to secure to the owners of the property some compensation or income from their investment. As to the amount of such compensation, if some compensation or reward is in fact secured, the legislature is the sole judge."

Such was also the principle established in the Granger cases in 94 U. S., where the court said: "Where property has been clothed with a public interest, the legislature may fix a limit to that which in law shall be reasonable for its use. This limits the courts, as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change." This doctrine was reaffirmed in Dow vs. Beidelman, 125 U. S. 680.

Third: That there may be special instances in which the courts will refuse to interfere, even though the rates fixed do

not yield enough to pay operating expenses. Chicago & Grand Trunk R. R. vs. Wellman, 143 U. S. 339; Reagan vs. Farmers Loan & Trust Co. 154 U. S. 362; St. Louis & San Francisco R. R. vs. Gill, 156 U. S. 649; Covington etc. Turnpike vs. Sanford, 164 U. S. 578.

In Chicago & Grand Trunk R. R. vs. Wellman, Mr. Justice Brewer said:

"It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries; fifty to one hundred thousand dollars to the president, and in like proportion to sub dinate officers? Surely, before the courts are called upo to adjudge an act of the legislature fixing the maximum pa nger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call operating expenses."

The above language was quoted with approval by Mr Justice Shiras, in delivering the opinion of the court in St. Louis & San Francisco R. R vs. Gill.

In Reagan vs. Farmers Loan & Trust Company, 154 U. S. 362, Mr. Justice Brewer said:

"It is unnecessary to decide, and we do not wish to be understood as laying down an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without

prejudice to the rights of others. There may be circumstances which would justify such a tariff; there may have been extravagance, and a needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value; the road may have been unwisely built, in localities where there is not sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built, as well as the rights of those who have built the road."

Fourth: That the evidence in the cases at bar shows that the rates allowed by the Nebraska statute will yield to each and every railroad in the state a profit upon its investment over and above operating expenses.

Fifth: That upon the foregoing propositions of law and fact the judgment of the court below should be reversed and the rates fixed by statute allowed to stand.

Sixth: But in case this court shall hold that it has the right to pass upon the reasonableness of the profit allowed to the railroads of Nebraska by the statute under consideration, then, in such case, appellants contend:

A. That the present value of the roads, as measured by the cost of reproduction, is the basis upon which profit should be computed.

In endeavoring to establish a reasonable rule, we are bound to consider the conditions which surround other occupations. Railroads are built, owned and operated by corporations; corporations are fictitious persons created by law; laws are made by the people through their representatives. It can not be assumed that natural persons would intentionally create fictitious persons and endow them with rights and privileges greater than they themselves enjoy. Neither can it be assumed that the natural persons who make the laws desire to exempt corporations, the creatures of law, from the vicissitudes which surround themselves. The ordinary business man cannot avail himself of watered stock or fictitious capitalization, nor can he protect himself from falling prices. If his property rises in

value he profits thereby—so do the owners of a railroad under similar conditions; if his property falls in value, he loses thereby—so must the owners of a railroad under similar conditions, unless it can be shown that railroad property deserves more protection than other forms of property. Can it be said that the railroad which carries the farmer's crop to market merits greater consideration than the farmer who raises the crop? Can it be said that the railroad which carries a manufactured product to market merits greater consideration than the manufacturer? Can it be said that the common carrier is deserving of greater consideration than the ordinary business man whose merchandise gives the railroad a reason for existence? Is the man who carries property from producer to consumer a more important factor in society than both producer and consumer?

Such a rule does not do injustice to stockholders and those who desire to purchase stock. If the owners of the road have bonded the road for enough money to cover its present value, their stock does not represent value. The owners of such a road stand in the same position as the owner of a farm who has incumbered it for all it is worth—his equity of redemption is a legal title without a market value. They stand in the same position as the owner of a business block or of a stock of merchandise who has obtained the entire value of his property from a mortgagee.

Such a rule does not do injustice to the holders of railroad bonds; if their bonds do not exceed the present value of the property, they can expect an interest; if their bonds exceed in amount the present value of the property, they stand in the position of any other mortgagee who loans upon insufficient security, or whose security diminishes in value after the loan is made. The only recourse the mortgagee usually has if his security becomes insufficient is to take the title to the property. If the first mortgage bonds equal or exceed the value of the property then the holders of subsequent liens stand in the same position as the man who invests in a second mortgage when the first mortgage covers the value of the property.

There can be no distinction made between bondholders and stockholders. If the states have a right to regulate rates, stockholders can not resist the demand for reasonable rates

by building the road with borrowed money. The stockholder invests in railroad stock, knowing that the road can only charge a reasonable rate and earn a reasonable return. The man who loans money to a railroad stands upon an equal footing with the stockholder, and, as against the state or the patrons, can assert no greater right than that possessed by the stockholders. Bondholders may foreclose their lien and become owners of the road. As against the state or the patrons they can have no higher privileges as bondholders before becoming owners than they have later as owners if it becomes necessary to take the road to satisfy their lien.

In support of the proposition that railroads should be placed upon the same footing as an ordinary business enterprise, it may be suggested that it is against public policy to raise up in any community or country a few persons, natural or corporate, and exempt them from the dangers and liabilities which must be encountered by the people in general. Those who are in possession of a monopoly are apt to be indifferent, if not actually hostile, to the interests of those who are immediately affected by a change in the business conditions of the country. If, for instance, railroad owners can demand a return upon capital never actually invested in the construction of the road, or upon the original cost when the property has decreased in value, they not only have an unfair advantage over those who are subjected to competition, but may actually profit by conditions which are disastrous to others. An unrestrained monopoly preys upon all those who are so situated that they cannot themselves enter into a monopoly.

An additional reason why the court should not enforce the demands of the railroads for returns upon inflated stocks and bonds, is to be found in the fact that such action on the part of the courts would greatly embarrass, if not entirely defeat, the effort which is being made in various states to prevent the overcapitalization of railroads. The Constitution of Nebraska, Art. XI., Sec. 5, contains the following provision: "No railroad corporation shall issue any stock or bonds, except for money, labor or property actually received and applied to the purposes for which such corporation was created, and all stock, divi-

dends and other fictitious increase of the capital stock or indebtedness of any such corporation shall be void."

No one will question the wisdom of this constitutional restriction, and yet it will be impotent to protect the people from watered stock if the courts establish a rule which will enable the railroad companies to collect an income upon over-capitalization.

In comparing the rights of the patrons of the road with the rights of the holders of stocks and bonds, it must be remembered that the patron relies upon the law which compels common carriers to offer their services for reasonable compensation, while the purchaser of railroad stocks or bonds only suffers from his own negligence if he fails to learn whether the money represented by those stocks and bonds actually went into the road or found its way into the pockets of railway promoters. If a person contemplates purchasing railroad bonds, he can enquire whether the railroad's indebtedness exceeds the cost of reproducing it; if he fails to make such inquiry, he ought to have no standing in a court of equity. He may be an innocent purchaser of bonds in the sense that the railroad issuing the bonds cannot make a legal defense to his claim, but he is not an innocent purchaser in the sense that the court must give actual value to his investment. In like manner the purchaser of stock can inquire whether the stock represents actual value; if he fails to inquire, or buys with knowledge that the debts exceed the cost reproducing the road, he has no equity which a court can enforce.

The evidence shows that the railroads of Nebraska can be reproduced complete for about twenty thousand dollars per mile.

The following table, taken from the brief of associate counsel, shows the amount of stock and bonds issued by the various railroads which are parties to this suit:

	Capital stock, per mile.	Funded debt, per mile.	Total, per mile.
C., B. & Q.	$14,439	$22,034	$ 36,473
C., St. P., M. & O.	25,103	17,504	42,608
F., E. & M. V.	23,352	16,238	39,590
U. P. Ry.	33,318	70,468	103,786
O. & R. V.	5,021	12,324	17,345

St. J. & G. I.	18,322	34,768	53,060
C. & O.	22,769	14,007	36,007
Mo. Pacific	44,746	48,462	93,208
Pacific R. R. in Neb.	15,010	15,000	30,010
K. & B. H.	14,175	13,496	27,625
C. R. I & P.	16,822	19,545	36,368

This table shows upon how large an amount of fictitious capital the roads will collect an income if allowed to collect from patrons enough money to pay interest upon all bonds and ~~interest~~ dividends upon all stock issued.

B. The rates fixed in the statute under consideration allow to the railroads of Nebraska a reasonable profit upon the present value of the roads. The evidence in support of this proposition will be discussed by associate counsel.

Seven. Counsel for appellees insists that competition gives to the patrons of a railroad full and complete protection from extortionate rates. This argument is sufficiently answered by the decisions already rendered by this court wherein it has repeatedly affirmed the right of the state to regulate railroad rates, but it may be added that a railroad is to a certain extent a monopoly; it is only because it is a monopoly that it can collect unreasonable rates. Competition can only act within certain limits. If a railroad is built between two points no other road can be built between those points (unless it mortgages the future) until the first road is realizing an income practically double a reasonable return upon the value of the road, because a new road would require an investment equal to the value of the first road and until transportation rates on business done would pay running expenses and a reasonable profit on both investments, competition would be prohibited. When two roads are built they must necessarily collect more in tolls than one road would be justified in collecting. The evidence in this case shows that the Union Pacific Railroad is capitalized (including both stock and bonds) at more than five times the cost of reproducing that portion of the road which lies within the state of Nebraska. If it should attempt to realize upon all of this capitalization it would probably encourage the building of a parallel line, but it can charge rates grossly excessive without fear of competition as to local traffic. The very existence of the road prevents the building of a new road

capitalized at present cost and even if a new road should be built, commerce would be compelled to bear a higher burden than it would if this road were limited to charges which would produce a reasonable return upon the actual value of the road. Mr. Justice Brewer, in Chicago, R. I. & P. R. R. vs. U. P. R. R., 47 Fed. Rep. 15 said:

"There is in this case a public interest as significant and deserving of protection. The testimony discloses that before this contract was entered into the Rock Island had determined to build a bridge across the Missouri river at Omaha, and fill the gap between Council Bluffs and Beatrice by its own line. In conjunction with the Chicago, Milwaukee & St. Paul Railway Company, it had obtained from Congress a charter for the building of the bridge; and negotiations were pending to secure the capital, some two or three millions of dollars, with which to do the work. At that time the officers of the Union Pacific sought the officers of the Rock Island and the St. Paul and prevented the building of the new bridge by means of this contract. If this contract had not been made, or if it should not now be enforced, two or three millions, at least, of additional capital would be put into railroad and bridge construction; and such an expenditure of money places an additional burden upon the public. Every unnecessary mile of railroad track or bridge that is built adds to the cost of transportation, and surely the public is interested in seeing that the cost be as light as possible. A very serious economic and political question is whether this free country has not made a mistake in giving too large liberty of railroad construction.

"Take a single illustration: In the state of Colorado, between Pueblo and Denver, are three independent lines of road, with separate and distinct tracks and rights of way. To say nothing of the waste of lands and the injury to farms, the cost of these three lines of road, I am assured, is much more than double that of a single right of way with two tracks; and such single right of way would be adequate for all the business that the three roads have done, or are likely to do, for many years. The public which uses these roads bears the burden of this extra cost. Would not its interests have been promoted if by contract or law all these railroads could have been compelled to unite in a single line? So, here, if the public can prevent an

increase of railroad property by the sum of two or three millions of dollars, it saves to itself the burden which that additional expense would cast upon us."

In the above case the court clearly points out the expensiveness of competition as a means of regulating railroad rates.

Eighth: Counsel for appellees insists that the rates fixed by railroad companies may be unreasonable and yet not unreasonable enough to give state legislatures a right to lower them; he divides rates into reasonable, not reasonable and unreasonable. Under the head of reasonable rates he includes what they should charge; under the head of not reasonable rates he includes those which the railroads may charge but should not; under the head of unreasonable rates he includes those which the roads must not charge. This division is not supported by authority. The law which requires carriers to transport goods at a reasonable compensation is an absolute one and does not depend upon the motive of the carrier. There is no twilight period between reasonable rates and unreasonable rates; rates which are reasonable may be charged; rates which are not reasonable can not be charged.

WILLIAM J. BRYAN,
Of Counsel for Appellant.